119—513

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 84.

HORACE H. ELDRED, PLAINTIFF IN ERROR,

vs.

THE BELL TELEPHONE COMPANY OF MISSOURI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 4, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 The United States of America to the Bell Telephone Company of Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein Horace H. Eldred is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered againt the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this tenth day of November, in the year of our Lord one thousand eight hundred and eighty-two.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

Service of the above citation waived this 10th Nov'r, 1882, for the Bell Telephone Company of Missouri.

HARRY HITCHCOCK,
Its Att'y.

1½ [Endorsed:] No. 2017. United States circuit court, eastern district of Missouri. Horace H. Eldred *vs.* Bell Telephone Co. Citation. Fled Nov. 10, 1882. M. M. Price, clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the September term, 1882, thereof, between Horace H. Eldred, plaintiff, and the Bell Telephone Company of Missouri, defendant, a manifest error hath happened, to the great damage of the said Horace H. Eldred, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this tenth day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri,
By A. P. SELBY, *Deputy.*

Allowed by—
SAMUEL TREAT, *Judge.*

2½ *Return to Writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court at office, in the city of St. Louis, this 10th day of November, A. D. 1882.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *D. C.*

[Endorsed:] No. 2017. United States circuit court, eastern district of Missouri. Horace H. Eldred *vs.* Bell Telephone Co. Writ of error to the circuit court of the U. S., east'r. dist. of Missouri.

3 *Petition.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States in and for said District.

Be it remembered that on the 15th day of May, A. D. 1882, there was filed in said court a certain petition in words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Missouri. September Term, 1882.

HORACE H. ELDRED, Plaintiff,
against
THE BELL TELEPHONE COMPANY OF MISSOURI, Defendant.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

Horace H. Eldred, the plaintiff in this suit, states that he is a

citizen of the State of New York, and that the Bell Telephone Company of Missouri, the defendant herein, is a corporation organized under the laws of the State of Missouri and is a citizen of Missouri.

And the said plaintiff further states that heretofore, to wit, on the 19th day of December, 1879, at the special instance and request of the defendant, he advanced, furnished, and delivered to the defendant, to be by the defendant accounted for to the plaintiff, two hundred and fifty shares of the capital stock in said defendant corporation, of the par value of one hundred dollars per share, of the personal property of the plaintiff, and which was then worth one hundred dollars per share, and twenty-five thousand dollars for the
4 whole two hundred & fity shares, and which the defendant then received from the plaintiff and afterwards appropriated to its own use, with the understanding that the defendant would pay the plaintiff for the same what it was worth, by means of which the defendant became liable to pay to the plaintiff the said sum of twenty-five thousand dollars; yet the defendant has never paid the plaintiff said sum of money or any part thereof, but refuses so to do.

Wherefore the plaintiff prays judgment against said defendant for the said sum of twenty-five thousand dollars & interest and costs.

WARREN & POWERS AND
THOROUGHMAN & VALLIANT,
Att'ys for Plaintiff.

And afterwards, to wit, on the 19th day of September, 1882, the following answer was filed in said cause, to wit:

Answer.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States for the said Eastern District of Missouri. September Term, 1882.

HORACE H. ELDRED, Plaintiff,
vs.
THE BELL TELEPHONE COMPANY OF MISSOURI, Defendant. } Law Cases, No. 2017.

Now comes said defendant and, answering the petition of
5 plaintiff in this behalf—

Denies that on December 19, 1879, or at any time, plaintiff, at the special instance or request of defendant, or otherwise, advanced or furnished or delivered to defendant 250 shares or any shares of the capital stock in the defendant corporationto be by said defendant accounted for to plaintiff, as alleged.

And denies that it, said defendant, ever appropriated to its own use any shares of stock which had been received by it from plaintiff with the understanding, as alleged, that defendant would pay plaintiff for said stock what it was worth.

Defendant denies that it ever received from plaintiff any share or shares of the capital stock in said defendant corporation upon or in

pursuance of any such understanding as in said petition averred; and denies that there was ever any understanding or agreement between said plaintiff and this defendant in virtue of or according to which defendant was to account to or with plaintiff for his said stock or the value thereof or any part of the same, or was to pay to plaintiff any sum of money for or on account of the same; and denies that defendant became liable to pay to plaintiff in the manner alleged the sum of $25,000 or any other sum.

Defendant further states the fact to be that on or about December 19, 1879, said plaintiff, who had previously become entitled to receive from this defendant as one of the original corporators thereof a total of 2,230 shares of said stock, did himself expressly agree to relinquish, and did relinquish and surrender, to this defendant his right to receive from said defendant 250 shares of said stock; that said agreement was voluntarily made by plaintiff at his own
6 instance and in consideration of certain benefits to him, said plaintiff, as a stockholder in said company, which were expected to accrue to him from such surrender of said 250 shares of stock to said corporation by enabling said defendant corporation therewith to acquire from third parties for the benefit of all of the stockholders in the defendant corporation, including said plaintiff, certain valuable rights and property for the prosecution of its business and purposes; that for said expected benefits and consideration the plaintiff did not, as alleged, advance and furnish to the defendant corporation, but did expressly surrender to said corporation, his right to receive from it said 250 shares of stock, and did then and there accept from this defendant, in full satisfaction of all right and claim on the part of him, said plaintiff, against this defendant, for capital stock thereof (1,980) nineteen hundred and eighty shares of the said capital stock of said defendant corporation, for which 1,980 shares a certificate was then and there by defendant, through its authorized agents, made out, issued, and delivered to plaintiff, and was by him accepted in full of all the shares of said stock to which he remained and was entitled; that afterwards, and with the knowledge and consent of plaintiff, who was at the time president of the defendant corporation, the said 250 shares of said stock therein so surrendered and relinquished by him, for the consideration aforesaid, were issued for value to other parties by this defendant, and thereby the benefits and consideration for which plaintiff had so relinquished and surrendered his right to the same were in fact secured and received, and said agreement of plaintiff on the faith of which this defendant did so issue to third parties said stock so previously
7 surrendered by plaintiff, was thereby executed; and defendant says that by reason of the premises plaintiff was and is estopped from setting up or asserting against this defendant or against any other person any claim or demand for or in respect of said 250 shares of stock so relinquished and surrendered by him or for the value or proceeds thereof or any part of the same.

And defendant avers that the transaction last herein set forth was the same transaction referred to by plaintiff in his petition in this behalf and none other, and except in the manner and for the con-

siderations above stated by defendant it is not true that in December, 1879, plaintiff furnished or delivered to defendant or that defendant received in any manner from plaintiff 250 shares of said stock in said defendant corporation.

Wherefore defendant asks to be hence dismissed with its costs.

By HITCHCOCK, LUBKE & PLAYER,
Attorneys for said Defendant.

And afterwards, to wit, on the 20th day of September, 1882, the following reply was filed in said cause, to wit:

Reply.

In the Circuit Court of the United States for the Eastern District of Missouri.

HORACE H. ELDRED
vs.
THE BELL TELEPHONE COMPANY OF MISSOURI.

8 Again comes the plaintiff, and, for reply to defendant's answer, says true it is that at the time plaintiff delivered to defendant said 250 shares of stock it was contemplated between both parties to said contract that the defendant would use said stock in the purchase or exchange from third parties of certain valuable rights and property; but plaintiff avers that said rights and property were to be acquired by the defendant in its own name and for its own & sole use and with no peculiar benefit to the plaintiff which would not in equal proportion be shared by all the stockholders.

And true it is said rights and property were purchased from said third parties, but plaintiff avers they were purchased in defendant's own name, and defendant has had and enjoyed the full and sole use and benefit of the same, and the price paid for the same was the said 250 shares of stock advanced and delivered by plaintiff to defendant.

But plaintiff denies each and every other allegation of defendant's answer and prays judgment as in the petition.

WARREN & POWERS,
THOROUGHMAN & VALLIANT,
For Plaintiff.

9 And afterwards, to wit, on the tenth day of October, 1882, the following further proceedings were had and appear of record in said case, to wit:

Verdict.

HORACE H. ELDRED, Plaintiff,
vs.
BELL TELEPHONE COMPANY, Defendant. } No. 2017.

Now come the parties, by their attorneys—the plaintiff by Messrs. Thoroughman and Valliant, and the defendant by Messrs. Hitchcock, Lubke, and Player—and this case being regularly called for

trial and both parties being ready it is ordered that a jury come, and thereupon come said jury, to wit: John P. Turner, John Fisher, A. W. Hathaway, Jacob Kidney, James D. Frier, James Griffin, John E. Liggett, John W. Wilder, R. S. Young, Gustave Olshauser, Hezekiah Bates, and Joseph P. Wilkerson, twelve good and lawful men, duly empaneled and sworn to well and truly try the issues joined herein, who, after hearing the evidence and arguments of counsel and receiving the charge of the court, return the following verdict: "We, the jury in the above-entitled cause, find for the defendant, A. W. Hathaway. Foreman."

It is therefore considered by the court that the plaintiff, Horace H. Eldred, take nothing by his writ herein; that the defendant, the Bell Telephone Company, go hence without day, and have and recover of the said plaintiff its costs herein expended, and that a fee bill or execution issue therefor.

9½ And afterwards, to wit, on the 12th day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

Motion to Set Aside Judgment for New Trial.

HORACE H. ELDRED, Plaintiff,
vs.
BELL TELEPHONE COMPANY, Defendant. } 2017.

Now comes the plaintiff, by attorney, and files motion to set aside judgment and for a new trial.

And afterwards, to wit, on the 30th day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

Motion to Set Aside Verdict & Overruled.

HORACE H. ELDRED, Plaintiff,
vs.
BELL TELEPHONE COMPANY, Defendant. } 2017.

The court having fully considered the motion of plaintiff to set aside the verdict herein, and for a new trial, it is ordered that said motion be, and it is, overruled.

10 And afterwards, to wit, on the 4th day of November, 1882, the following further proceedings were had and appear of record in said case, to wit:

Bill of Exceptions Allowed.

H. H. ELDRED, Plaintiff,
vs.
BELL TELEPHONE COMPANY, Defendant. } No. 2017.

Now comes the plaintiff, by attorney, and presents to the court his bill of exceptions, which is allowed, signed, and ordered to be

filed and made part of the record herein. And thereupon, on motion, leave is granted plaintiff until November 10th to perfect his writ of error and give bond.

And afterwards, to wit, on the tenth day of November, 1882, the following further proceedings were had and appear of record in said case, to wit:

Now comes the plaintiff, by attorney, and presents to the court his writ of error to remove this cause to the Supreme Court of the United States, and also presents to the court a citation citing and admonishing the said defendant to be and appear at a Supreme Court of the United States to be begun and holden at Washington on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge. And the said plaintiff also presents to the court a bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed as part of the record herein.

11 *Bill of Exceptions.*

Said bill of exceptions is in words and figures following, to wit:

In the United States Circuit Court for the Eastern District of Missouri.

HORACE H. ELDRED, Plaintiff,
vs.
THE BELL TELEPHONE COMPANY OF MISSOURI, Defendant.

Appearances: For plaintiff, Warren & Powers and Thoroughman & Valliant; for defendant, Hitchcock, Lubke & Player.

Be it remembered that on the 10th day of October, 1882, the above-entitled case came on for trial before Hon. Samuel Treat and a jury, and the plaintiff, to sustain the issues on his part, introduced evidence as follows:

Deposition of H. H. Eldred.

HORACE H. ELDRED, plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. POWERS:

My name is Horace H. Eldred, and I am the plaintiff in this suit.

Q. What was your business in the fall of 1879?

A. I was general manager of the telephone department of the Western Union Telegraph Company of New York.

Q. Do you know who owned and controlled the exchanges of Saint Louis and Kansas City at that time?

12 A. The stock of Kansas City Telephonic Exchange was in my name to the extent of $\frac{9}{100}$ of the stock in trust for the Western Union Telegraph Company, and of the American District Telegraph Company about 263 shares out of 500 were held by the Western Union Telegraph Company.

Q. Then, as I understand it, the exchanges of these two places were under the control of the Western Union Telegraph Company?

A. Yes, sir, and also the Gold and Stock Exchange at St. Louis and the Western Union Exchange at Kansas City.

Q. About this time you may state, if you know, what became of these exchanges—to whom title passed?

Mr. HITCHCOCK: Do you mean the American District Telegraph Company?

Mr. POWERS: No, sir; the telephonic exchanges; the Gold and Stock Exchange of Saint Louis and the Kansas City Telephonic Exchange.

Defendant objects that the evidence should be in writing. Objection sustained. Exception then and there taken.

Q. You may state whether or not you owned the franchises of these exchanges—purchased them.

A. Of what date?

Q. In the fall of 1879.

A. Yes, sir; on the 29th day of November, by arrangement with the Western Union Telegraph Company and myself, I became practically the owner of the property, with the exception of half of the stock of the American District Telegraph Company of Saint Louis.

Q. What were the terms of the purchase by you?

Mr. HITCHCOCK: What purchase?

Mr. POWERS: Of these exchanges; he says that they became his property.

Defendant objects as irrelevant. Objection sustained. Exception then and there taken.

13 Q. You may state the next step taken by you after you became the owner, as you have stated, of the franchises of Kansas City and Saint Louis towards the organization of the Bell Telephone Company of Missouri?

A. I came to Saint Louis in the early part of December, 1879, and organized the Bell Telephone Company of Missouri, with a capital stock of $400,000, to which I turned over these rights which I obtained for Kansas City, and also the agreement for the Western Union Exchange at Kansas City and the Gold and Stock at Saint Louis.

Q. After you had organized the Bell Telephone Company of Missouri what was the next step taken before the organization of the present company?

A. We proceed to organize the company which now has an existence; we organized the present company.

Q. For what purpose was the present company organized?

A. For the consolidation of the American District Telegraph Company with the Bell Telephone Company of Missouri.

Q. What was the capital stock of the first Bell Telephone Company?

A. $400,000.

Q. The stock of the present company was how much?

A. $400,000.

Q. What was the capital stock of the American District Telegraph Company?

A. $25,000.

Q. What was the par value of the shares of stock of the respective companies?

A. The American District Telegraph Company was $50 a share and the stock of the Bell Telephone Company of Missouri was $100 per share.

Q. What became of the stock of the original Bell Telephone Company?

A. I believe it was cancelled.

Q. To whom was it issued?

A. It was issued to Mr. Durant, Mr. Storke, Mr. Smith, Mr. Kent, and myself.

Q. Can you state the amount of shares that were issued to each?

A. I think I can.

14 Q. Please do so.

A. 2,230 to myself; 750 to Durant; 750 to Storke; 20 to Smith; 250 to Kent. I believe that makes 4,000 shares.

Q. What was the consideration upon which that stock was issued to these stockholders?

A. To these other parties?

Q. Yes, sir.

A. It was a gift to them.

Q. Did you invest any money or advance any money at the organization of this company?

Defendant objects as immaterial. Objection sustained. Exception then and there taken.

Q. State what was the next step towards the organization and the perfection of the organization of the Bell Telephone Company of Missouri as at present existing, so far as the consoldidation is concerned.

A. We met several times, and I remember that at that time there seemed to be some difficulty about the consolidation of the two companies in consequence of the statute of the State having been changed. There were several meetings held, and I belive the attorneys who had charge of the matter finally made the consolidation under both of the statutes, which necessitated considerable delay. On coming together we had issued 4,000 shares of stock, and we wished to consolidate with the American District Telegraph Company, of which I was then president. I was president of both companies. Therefore it became necessary to provide for some shares to take up the stock of the American District Telegraph Company. These gentlemen with whom I had been already associated, four in number, at that time were all personal friends of mine, and I gave them this stock.

All the business was like a family operation. Two of the parties were in New York, Mr. Kent and Mr. Storke, and Durant,
15 Smith, and myself were here. Previous to my coming to St. Louis I had obtained proxies for the purpose of voting of the stock of Mr. Storke and Mr. Kent, they not being present, and, as I had agreed with them in regard to the proportion of stock which I was to give them, I didn't feel authorized to act for them without authority, and therefore I said that I would advance the 250 shares necessary to make up the capital stock of the American District Telegraph Company out of the proportion which was to be issued to me. I think that was the way it was done. We had some trouble about the minutes under the existing statute, and I think they were fixed up by the attorneys afterwards, after I left the city, or about that time.

Q. Who were your attorneys?

A. Messrs. Overall & Judson. I forgot to add that before we made the consolidation [with] the American District Telegraph Company we went to Kansas City and consolidated the Kansas City Telephone Exchange with the Bell Telephone Co. of Missouri, and also took possession of the Western Union Telephonic Exchange at that place.

Q. Where did these meetings for the purpose of the consolidation of the companies take place?

A. A portion of them took place at 214 North 6th street; some at the office of Overall & Dudson, and I believe there were one or two meetings at the Lindell Hotel, in Saint Louis.

Q. At what time did these meetings take place?

A. In 1879, during the month of December.

Q. Do you know what was done with that stock after you transferred it to the company?

A. I believe it was issued to the stockholders of the American District Telegraph to take up their stock.

Q. Then all the telephonic interests of St. Louis and Kansas
16 City were consolidated into one organization, called the Bell Telephone Company of Missouri?

A. Yes, sir.

Q. Did you sell any of the stock of the Bell Telephone Company of Missouri on or about the time of the consolidation?

A. I did.

Q. How much and for what amount?

A. Fifty shares, at par value.

Q. Of $100 a share?

A. Yes, sir.

Q. To whom was that stock sold?

A. To Gov. Taber, of Colorado.

Q. Party other than the stockholders you have named?

A. Yes, sir.

Q. Was that sale for cash?

A. Yes, sir.

Q. Was that the value of that stock at that time?

A. That is what we considered it worth.

Q. Do you know what the stock is worth now?

A. The last I heard it was worth $115.

Q. Look at these letters and state if you know from whom they were issued. (Letters shown witness.)

A. Yes, sir.

Q. Here is another letter. Is that in the same handwriting? (Letter shown witness.)

A. Yes, sir.

Q. Those letters came from the National Bell Telephone Company of Boston, did they not?

A. Yes, sir.

Mr. POWERS: I wish to introduce in evidence the three letters identified by the witness.

Q. These letters which have been shown you were received by you on or about the dates at which they purport to have been written, were they not?

A. Yes, sir; November 29th.

Q. These letters were the outcome of previous negotiations that you had had, were they not?

A. Yes, sir.

Plaintiff reads said letters in evidence as follows, to wit:

17 A.

"Subject—St. Louis & Kansas City.

"BOSTON, *October* 21*st*, 1879.

"H. H. Eldred, Esq., general manager telephone dep't, Western Union Tel. Co., New York.

"DEAR SIR: Yours of the 20th October in regard to St. Louis and Kansas City to hand.

"We have every day this week either a directors' or stockholders' meeting, so that our people will be very busily engaged.

"As there is a contract with both the St. Louis and Kansas City Co., and as our people are just at present very much engrossed in arranging the details for the increase of the business that they expect under the consolidation, I think it would be well for you to wait a few days.

"You can depend upon our Co. arranging matters as I talked of if these negotiations turn out as satisfactorily as we anticipate.

"I shall be glad to let you know anything further in regard to it at any time.

"Respectfully, THEO. N. VAIL,
"*G. Manager.*"

18 B.

"Subject—personal.

"BOSTON, *November* 29, 1879.

"H. H. Eldred, Esq., New York.

"MY DEAR SIR: In further reference to our conversation I would

respectfully offer you as a consideration to enter our service a salary of $3,000 per annum and the right to operate the exchanges in Kansas City and St. Louis under the general terms contained in my letter of even date herewith.

"You will, if you accept this, please arrange so that you can commence with us at the earliest possible day.

"Yours truly, THEO. N. VAIL,
"*Gen'l M'g'r.*"

C.

"BOSTON, *November* 29, 1879.

"H. H. Eldred, Esq., New York.

"MY DEAR SIR: If you accept the proposition contained in my letter of even date herewith we will arrange for St. Louis and Kansas City as follows:

"St. Louis: Contract to be made for district or exchange purposes to expire at the same date with the present agreement between our Co. and the Kansas City Telephonic Exchange; the form, our new standard, and the rates to be the regular rental less a discount of 50 % until March, 1881; after that regular rental without discount until the expiration of contract. The present contract between this company and the American District Telegraph Co. of St. Louis to be surrendered.

"Kansas City: Present agreement between this company and the Kansas City Telephonic Exchange to be surrendered; a new arrangement to be made covering same period; form to be our new standard; rates to be the same as in present agreement.

"The regular rental at present is ten dollars per annum for each telephone, this company reserving the right to change it at its option, but the rate fixed to apply alike to all licenses.

"At the expiration of these agreements this company will give the Bell Telephone Company of Missouri preference over other parties in any arrangement it may desire to make for the extension of these licenses.

"Yours truly, THEO. N. VAIL, *G. M.*"

D.

"NEW YORK, *March* 25, 1880.

"H. H. Eldred, New York.

"MY D'R SIR: Y'rs of M'ch 25 in relation to your agreement with the N. B. T. Co. relating to the contracts with St. Louis & Kansas City rec'd.

"The Co. will execute the contract as therein agreed, providing you carry out all the conditions imposed upon you, excepting the one which requires you to enter into the service of the N. B. T. Co.; from this you are released. This condition is referred to in the first clause of my letter of Nov. 29.

"Very resp'y, THEO. N. VAIL,
"*G. M. National Bell Tel. Co.*"

Q. Mr. Eldred, I will ask you if you have ever made a deman upon the company for the return of this stock or payment to you of the value of it?

A. Yes, sir.

Q. When did you make such demand?

A. About the 14th of October—last year.

Cross-examination by Mr. HITCHCOCK:

Q. Was there ever any written agreement between you and the Bell Telephone Company of Missouri executed on the part of that company or any officer thereof in respect to the 250 shares of stock mentioned in this suit?

A. No, sir, nor no other agreement, as I remember, in regard to anything else.

Q. No written or oral agreement?

A. I said no other agreement in regard to anything else.

Q. There was never any agreement in regard to that subject?

A. No, sir.

Q. There was never any paper drawn on the subject of your supposed sale, or what you claim to have been a sale to them or advance to them, of this stock?

A. There was no paper to my knowledge.

Q. You never signed any, nor no officer of the company ever signed any to your knowledge?

A. Not to my knowledge.

Q. Do you know of any meeting of the directors of this company at which any action was taken by the board of directors of this company on that subject?

A. Not to my knowledge.

21 Q. Will you state whether any promise was made to you at any time, to you individually, by any officer of this company as such for any return or repayment of these shares or their value?

A. There was no more promise or agreement for the return of these shares than there was for the repayment of the cash which I had advanced the Co., and which they afterwards, on demand, returned to me.

Q. I ask you a specific question and I want you to confine yourself to it. Was there any promise made to you on this subject by any officer of the company?

A. There was no promise.

Q. Did you ever make any demand on the company in reference to this supposed claim until October 14th, 1881?

A. No, sir; I never had occasion to.

Q. You never did? That is all I want to know. You stated in your examination-in-chief that you owned, in the fall or early winter of 1879, the franchises of St. Louis and Kansas City. Am I right in supposing that when you said that you meant that you had the promise contained in these letters read in evidence?

A. Still more than that.

Q. Was there any license issued to you personally prior to December 1st, 1879?

A. Not that license part, but there was something else.

Q. Was there any grant or license issued to you covering any of these telephonic patent rights in St. Louis and Kansas City up to the time *up to the time* that the Bell Telephone Company of Missouri was first organized in December, 1878?

A. Yes, sir; the license of the Kansas City Telephonic Exchange was endorsed over to the Bell Telephone Company of Missouri the same day these letters were written—Nov. 29th. The privi-
22 leges were transferred to the Bell Telephone Company of Missouri. The contracts express the conditions that they could not be transferred to any other parties without the permission of the National Bell Telephone Company, and that permission was granted at the same time those letters were delivered to me—Nov. 29th.

Q. That permission that you speak of, as I understand it, was this: There was at that time outstanding licenses from the National Bell Telephone Company to the American District Telegraph Co., which the American District Telegraph Company was operating under. Is that so?

A. Yes, sir.

Q. In that license it was provided that the American District Telegraph Company should not assign it to anybody without the consent of the licensor, and the licensor agreed in advance that they might assign that contract to you?

A. Yes, sir.

Q. Then what you mean when you say you owned this license was this: That you had the offer contained in those letters and the consent of the National Telephone Company that the parties running the telephone here might transfer it to you?

A. Yes, sir, and something else.

Q. What else?

A. I held 263 shares of stock, or a controlling interest in the American District Telegraph Co. the purchase of which was included in the general arrangement which I made for acquiring the property in both of these cities, and for the purpose of carrying out the consolidation they gave me proxies to vote this stock. I was really the owner of the stock, because I became responsible to the Western Union Telegraph Co. for payment to them of the purchase price.

Q. Then you were not the owner of these privileges in any other sense than this: That the party owning the patent had promised to make a new contract with you on condition, among other
23 things, that the party having the license should surrender it, and you being the principal stockholder in the American District Telegraph Company put you in a position to bring about that surrender?

A. That was one of the positions as far as the Bell Telephone Company was concerned, but not in regard to St. Louis, because there was another company operating here which had a license, the Gold and Stock Exchange of St. Louis.

Q. That was run by the Western Union Telegraph Company?

A. Yes, sir.

Q. That didn't belong to you, did it?

A. Under the same arrangements that I made for the purchase of the other properties. I made myself responsible for more than $55,000, which included the 263 shares of the stock of the American District Telegraph Co., the Gold and Stock Exchange in St. Louis, the Bell Telephonic Exchange of Kansas City, and the Western Union Telephonic Exchange at the same place.

Q. When you say that you were the owner you mean that you were in such a position that you were able to go on and get the ownership; but you didn't own the license, did you?

A. I had ⅔ of it; I had all the license in Kansas City; I had the Golden [and] Stock Exchange license here, and all I lacked was half of the Bell license in St. Louis.

Q. Do you mean to say that the license had, in fact, been transferred to you, or that you were in a position to bring it about. I am speaking of early in December.

A. In the agreement for consolidation of telephone interests of the United States, made between the Bell Telephone Co. of Boston and the Western Union Telephone Co. of New York, it was agreed that instruments would be furnished to both licenses in any place where rival exchanges existed until arrangements were made for the consolidation of such local exchanges.

24 Q. At the time that the Bell Telephone Company of Missouri was organized, is it not true that the American District Telegraph Company held and was operating the license under which they had used telephones?

A. They did for a very short period; they held it for about a year and then it came over to me.

Q. Part of the condition of the promise made to you was that the present contract, in force November 29, 1879, between the National Telephone Company and the American District Telegraph Company of Saint Louis, was to be surrendered, was it not?

A. Yes, sir.

Q. That you were to procure?

A. Yes, sir.

Q. You procured that subsequently by effecting a consolidation, did you not, between the American District Telegraph Company and the Bell Telephone Company of Missouri?

A. Yes, sir.

Q. That is the way you did it?

A. Yes, sir.

Q. And the Bell Telephone Company of Missouri became possessed of the license by means of the consolidation of two companies, which brought into the Bell Telephone Company of Missouri the license and plant and property which the American District Telegraph Company had previously used?

A. Yes, sir.

Q. You organized the Bell Telephone Company of Missouri about the third of December, 1879, did you not?

A. Yes, sir; somewhere about the first part of December; I don't know the exact date.

Q. These are the articles under which the Bell Telephone Company of Missouri was organized, are they not? (Paper shown witness.)

A. I believe they are; I am really unable to say whether it is the first or second, but I think it is the second company.

25 Q. Won't you look at the articles and see?

A. It says the third day of December; I should judge it that must be the first one.

Q. When you speak of the second company do you mean that this organization was abandoned and a new one made, or do you mean simply that articles of consolidation were filed which brought in the American District Telegraph Company, and the same name and the same organization was continued?

A. As I understand it there was a new company formed.

Q. Was it formed in any other way except by articles of consolidation?

A. I don't remember the exact legal way, but I know that it was a consolidation of two companies; we were advised that we had to have a new company, and it took the same name.

Q. And the same amount of stock?

A. Yes, sir.

Q. Was there any change in the stock except in respect to issuing the 250 shares to the stockholders of the American District Telegraph Company?

A. Not so far as I remember.

Q. That was all that was done, was it not?

A. I believe that was all.

Q. When this first company, as you are pleased to call it, was formed—this Bell Telephone Company of Missouri—how many shares of stock were there in the articles?

A. 4,000.

Q. Of these, the articles set forth that you took 2,230?

A. Yes, sir; I believe that is the number.

Q. Durant, 750; Kent, 250; Storke, 750, and Smith, 20; that makes the 4,000, does it not?

A. I believe that is correct, sir.

Q. Were those shares taken as full paid or subscribed to be paid for?

A. They were taken as full paid.

Q. What was paid for them to the Bell Telephone Company of Missouri?

26 A. There was the entire capital stock of the Kansas City Telephonic Exchange, with a nine-year license from the Bell Co. for the use of instruments, the Western Union Telephone Exchange at Kansas City, and the Gold and Stock in St. Louis, and 263 shares, or a controlling interest, of the American District Telegraph Company of St. Louis.

Q. Do you remember the dates of these transactions?

A. The books, I think, will give the dates. I can't give them to you exactly, but it was some time during the month of December.

Q. How much money did you pay to the Bell Telephone Company of Missouri for the 2,230 shares of stock?

A. I advanced about $6,000 to pay the expenses of starting the company. The Kansas City Telephonic Exchange stood me $15,000.

Q. I didn't ask you the value of any rights you transferred to the Bell Telephone Company of Missouri; I ask you whether you paid any money to the Bell Telephone Company of Missouri as subscription on the stock of that company, and you tell me that you turned in certain rights.

A. No, sir; I didn't turn in certain rights. I turned in the Kansas City Telephonic Exchange, which cost me $15,000.

Q. Did you pay any money to the Bell Telephone [Company] of Missouri independent of that?

A. Independent of that, nothing.

Q. No money at all?

A. No, sir.

Q. Then I understand you to say that the Kansas City Telephonic Exchange stood you $15,000, and you turned it over to the Bell Telephone Co. of Missouri?

A. Yes, sir, as also the Gold & Stock Exchanges in both places and the stock of the American District Telegraph Company.

Q. Then you transferred to the Bell Telephone Company of Missouri the property and plant of two other companies, which it received and issued you full-paid stock?

27 A. We had full-paid stock. Before the consolidation of the American District Telegraph Company there was only the Knsas City Telephonic Exchange, in Kansas City, and the Gold and Stock Exchange, in St. Louis, and the Western Union Telephone Exchange, at Kansas City, consolidated into this company. There was no cash capital subscribed.

Q. Did you see any cash capital subscribed to the Bell Telephone Company of Missouri?

A. No, sir; but this property that was put in represented cash and cost me cash.

Q. There was no cash capital subscribed or paid in?

A. No, sir.

Q. The stock that was issued to these other gentlemen, Storke, Kent, and so on, you say you gave them?

A. Yes, sir.

Q. Was that issued to them full paid?

A. Yes, sir; I brought them in as the number necessary to form the company.

Q. And you brought them in for that purpose?

A. That was not the particular reason why I brought them into the company and gave them their shares; it was necessary to have a company.

Q. That was one of the reasons, was it not?

A. That was not the particular reason. I gave the stock to the gentlemen because they had been intimate, personal friends of mine

and worked with me. It happened that there was just the right number required by the statute.

Q. In other words, you found that it would be necessary to have five persons, and you assigned to them certain shares of stock full paid?

A. Yes, sir.

Q. What consideration did the Bell Telephone Company of Missouri receive for that stock?

A. Nothing; the other people paid nothing for their stock.

Q. Isn't this the fact, that you got up the Bell Telephone Company of Missouri upon the basis of turning into it the Gold
28 & Stock Exchange, the Kansas City Telephonic Exchange, and the rights which were promised you for the future by the letters from the National Bell Telephone Company on condition that the American District Telegraph Company should surrender its rights?

A. And also on the basis of the license for the instrument furnished by the Gold & Stock Co. and the Western Union Telegraph Company for Kansas City and St. Louis.

Q. That is, you were promised by the National Telephone Company that they would take you instead of the companies already organized then and issue you license, on condition that you obtain the surrender of existing contracts?

A. In the general consolidation between the Western Union and the Gold & Stock Telegraph Company with the American Bell Telephone Company of Boston the conditions were such that instruments should be furnished to all rival exchanges until a compromise could be effected; therefore I had the license to use the instrument furnished by the Gold and Stock Company at both Kansas City and St. Louis, but working in harmony with the Bell Company. I was trying to effect a consolidation which had already been contemplated at Boston.

Q. And one of the conditions stated in these letters was that the American District Telegraph Company should surrender the contract which it already had with the National Telephone Company?

A. Yes, sir; which had about a year to run, and of which I was president.

Q. It is true that until the American District Telegraph Company did in some way surrender and turn over its license you could not carry out the conditions in that letter?

A. That may be so, sir.

29 Q. Is it not true that it was indispensable, before you could fulfill the conditions contained in those letters, for you in some way, by consolidation or otherwise, to get the American District Telegraph Company to surrender their rights and get out of the way?

A. Not entirely so; I had already all the rights in Kansas City and half of them here. Part of these conditions were already fulfilled. As far as Kansas City was concerned, all the terms of these letters had been fulfilled.

Q. Is it not true that you were bound to fulfill them before you could claim the rights offered in these letters?

A. Yes, sir; but I had the power to do that.

Q. Were you not obliged to do it?

A. Yes, sir; I most assuredly was obliged to do it.

Q. And unless you did succeed in getting the American District Telegraph Company license out of the way you would not be able to claim the offer made to you in these letters?

A. No, sir; I had, as I have explained before, fulfilled all the terms and conditions of the letters in reference to Kansas City and had the power in my own hands to fulfill all the remaining conditions in St. Louis, and inasmuch as I held a majority of the stock of the American District Telegraph Co. and the agreement from the Bell Co. that the license which they issued to the latter-named Co. could be assigned to the Bell Telephone Company, of Missouri.

Q. At the time this letter was received, the 29th of Nov., and consented to by you, is it not true that in order to get the benefit of the offers made to you in this letter you were obliged in some way to get the American District Telegraph Company to surrender its contract?

A. Yes, sir.

Q. And no matter what means you took afterwards, until you did do that, you never have been in a position to be benefited by these letters?

A. I was in a position to be benefited by it.

Q. Without fulfilling that condition?

A. Without fulfilling that condition.

Q. You said just now that you had already obtained the transfer of the Kansas City Telephonic Exchange?

A. I did.

Q. Do you know what date you obtained it?

A. Some time in December, I believe.

Q. We have already found that you organized the Bell Telephone Company of Missouri the third of December?

A. The first company.

Q. At that time had the Kansas City Telephonic Exchange been transferred? See if that is the deed by which it was done. (Paper shown witness.)

A. The 8th of December; yes, sir.

Q. Then it was some time after the Bell Telephone Company of Missouri was organized that you took this step towards fulfilling the conditions?

A. I think that we commenced immediately; I forgot the formalities we had to go through at Kansas City; we went from here to Kansas City and made the consolidation at that place.

Q. Then you will agree with me that at the time that offer was made and accepted by you you had not obtained the Kansas City Telephonic Exchange?

A. On November 29th I had obtained nothing under the date of those letters. It has just come to my mind that the contract between those great companies for consolidation required that these ex-

changes should be transferred to the American Bell Co. I have a copy of the letter there from the American Bell Telephone
31 Company requesting a transfer of their rights upon assuming that I should pay the amount due.

Q. The point I am calling your attention to is simply this: That at the time this offer was made and accepted it was made upon conditions that you had to fulfill; that you went on in pursuance of that and got this Kansas City Telephonic Exchange, and afterwards got the American District Telegraph Company to surrender its license by consolidating it with the Bell Telephone Company of Missouri?

A. Also by the letter referred to, addressed by the president of the Bell company to the Western Union Telegraph Company at New York, which was a portion of the contract at that time. It was an order for the Western Union to deliver to me the exchanges in the cities of Kansas City and St. Louis upon the payment of the indebtedness, so that it would in no way make the Bell company liable for any purchase-moneys. The letter related to the Bell telephone rights at these points. There is the letter. It related to the rights spoken of in the letters of Mr. Vail.

Q. This letter is signed W. H. Forbes, president?

A. Yes, sir; that is a copy of the original.

Q. Do you know it to be a true copy?

A. I do. W. H. Forbes is president of the National Bell Telephone Company; that company has since been merged into the American Bell Telephone Company.

Q. Mr. Vail and Forbes were officers of the company at that time?

A. Yes, sir.

Q. Look at that paper. Whose signature is that? (Paper shown witness.)

A. That is my signature.

Q. As president of the Bell Telephone Company of Missouri?

A. Yes, sir; and Mr. Durant was the vice-president of the American District Telegraph Company.

Q. Look at that paper and see what it is? (Paper shown witness.)

32 A. I suppose this is the articles of consolidation, if it is the original.

Q. Do you recognize that as the original?

A. Yes, sir, I think I do.

Q. That is the original agreement made between the Bell Telephone Company of Missouri and the American District Telegraph Co., that they would consolidate on certain terms there stated, is it not?

A. Yes, sir.

Q. That agreement was dictated at a meeting of the stockholders of the two companies, was it not?

A. Yes, sir; I recollect that.

Q. Do you recollect of authorizing the call for that meeting for consolidation to be published?

A. I don't remember this special one, but I know there was one about that time.

Q. There was a notice of that meeting published, was there not?
A. I believe there was, sir.
Q. Look at that paper and see whether your name signed there was written by you and the name of the Western Union Telegraph signed by you. (Paper shown witness.)
A. Yes, sir.
Q. What is that paper?
A. I believe that is the paper calling for a meeting of the stockholders of the American District Telegraph Company—that is a call upon the directors of the American District Telegraph Company to order a stockholders' meeting to consider the question of consolidating it with the Bell Telephone Company of Missouri.

Plaintiff objects as going into new matter. Objection sustained.

Q. Did you state that 2,230 shares of full-paid stock of the first Bell Telephone Company of Missouri was issued to you?
33 A. I am not positive, but I think there was.
Q. Perhaps I can refresh your memory. Do you recollect about the issue of the first certificate of stock?
A. I think you have them in your hand, sir.
Q. See if these are the original certificates. (Papers shown witness.)

Plaintiff objects as irrelevant. Objection overruled. Exception then and there taken.

Q. Do you recognize either of those certificates as issued to you?
A. Yes, sir.
Q. How many?
A. 1,980.
Q. Did you receive any other certificates of stock but that from the company?
A. Not that I remember.
Q. At what date was that issued?
A. The 19th day of December.
Q. That is the same day, is it not, that you claim in your petition you advanced 250 shares of stock?
A. I believe that is the same; these certificates of stock were all issued to me on the same day, or within a few hours of each other.
Q. Do you recognize those as all of the original certificates issued?
A. Yes, sir.
Q. How much do those certificates call for now?
A. 3,750 shares if I haven't computed them wrong.
A. If you add 250 shares to that, of course, it makes 4,000.
A. Yes, sir.
Q. I think you said in your examination-in-chief that the other 250 shares were subsequently issued to the stockholders of the American District Telegraph Company in exchange for their stock in that company.
A. I think that was done, sir.

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31 Company requesting a transfer of their rights upon assuming that I should pay the amount due.

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Q. Mr. Vail and Forbes were officers of the company at that time?

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A. Yes, sir.

Q. How many?

A. 1,980.

Q. Did you receive any other certificates of stock but that from the company?

A. Not that I remember.

Q. At what date was that issued?

A. The 19th day of December.

Q. That is the same day, is it not, that you claim in your petition you advanced 250 shares of stock?

A. I believe that is the same; these certificates of stock were all issued to me on the same day, or within a few hours of each other.

Q. Do you recognize those as all of the original certificates issued?

A. Yes, sir.

Q. How much do those certificates call for now?

A. 3,750 shares if I haven't computed them wrong.

A. If you add 250 shares to that, of course, it makes 4,000.

A. Yes, sir.

Q. I think you said in your examination-in-chief that the other 250 shares were subsequently issued to the stockholders of the American District Telegraph Company in exchange for their stock in that company.

A. I think that was done, sir.

Q. State, if you can, what actually took place—not your imagination or understandings, but what actually took place at the
34 time you agreed that this 250 shares of stock should be issued to the stockholders of the American District Telegraph Company?

A. All that I remember about that particular portion of it is that it was at no meeting of the board; so far as my recollection goes Mr. Durant was the only person present, and we found by figuring up the stock that we hadn't enough shares to take in the American District Telegraph Company of Saint Louis. These gentlemen in interest were all personal friends of mine. Some of them were in New York and I had no authority to make any concessions for them, and I therefore agreed with Mr. Durant, who was vice-president and general manager of the company, to advance 250 shares of the stock of the Bell Telephone Company of Missouri, so that we might take up the entire capital stock of the American District Telegraph Company.

Q. You say that you "agreed." What did Durant say?

A. Mr. Durant didn't have much to say about it; I was the owner of the property, and he acquiesced generally in all I did.

Q. You offered these 250 shares of stock to be used in that way?

A. Yes, sir.

Q. And Durant acquiesced in it?

A. Yes; he acquiesced or he wouldn't have taken the stock.

Q. Wasn't Mr. Smith present at the same time?

A. No, sir; he was not.

Q. Are you sure of that?

A. I am.

Q. You said, in your direct examination, that Overall & Judson were your attorneys in behalf of the company?

A. I employed them as my attorneys, sir.

Q. Did you employ them individually?

A. I asked Durant for some good attorneys and he recommended me to Overall & Judson.

Q. Don't you know that those gentlemen were working as attorneys for the Bell Telephone Company of Missouri?

35 A. They were employed by me to organize the Bell Telephone Company of Missouri; I was president of that company after it was organized.

Q. Did Overall & Judson ever render you a bill for their legal services?

A. Not that I remember.

Q. Did you ever pay them for their legal services out of your money?

A. I paid them between two and three hundred dollars for something in connection with the Bell Telephone Company of Missouri, in the organization of that company.

Q. Don't you remember this, that during the interval between the time when the meeting was called for the consolidation of the two companies and the time when it was held *that* Overall & Judson were seen and requested to prepare the form of the proper entries

to be made; that they prepared a draft and submitted it to you, Durant, and Smith?

A. No, I don't remember that; I remember that Messrs. Overall & Judson stated that the statutes were rather mixed up and they were undecided what course to take in regard to the matter; I went to Denver about that time and when I came back the matter was fixed up.

Q. When you came back is it not true that you were in a great hurry to get off?

A. Yes, sir.

Q. And were they not urged to get things ready very rapidly?

A. Yes, sir; that is true.

Q. Do you remember that, for the purpose of completing this transaction, *that* Overall & Judson prepared a draft of what should be the proper proceedings and minutes?

A. We left it to Overall & Judson to be fixed up in the proper shape.

Q. Look at these papers and see whether that is not a draft which Overall & Judson prepared and sent in to you? (Paper shown witness.)

A. From the first look I would state that I never saw this
36 paper before, although it is posssble that I may have seen it.

Q. Do you know what this book is? (Book shown witness.)

A. I think it is the first minute book of the Bell Telephone Company of Missouri.

Q. That was the book kept by the secretary of the company for the minute book of the company?

A. Yes, sir.

Q. Do you find any minutes of a meeting held on the 19th of September, 1879, when you say you and Durant were present and you turned over the 250 shares?

A. I tell you that was not done at a meeting.

Q. You never saw any of these papers? (Papers shown witness.)

A. I don't recognize that paper; it may have been in my hand; I have no recollection of those papers; I may have had them, but I have nothing to identify them. I remember that after my talk with Durant we found out that there was not within 250 shares enough stock to take up the stock of the American District Telegraph Company; there were several lots of papers brought to the office, and when I returned from Denver I found them.

Q. You say that you didn't hold any proxies from Storke or Kent which authorized you to surrender anything for them?

A. I held proxies from Storke and Kent, but they were only proxies to vote on their stock.

Q. And you didn't undertake to act for them in that matter at all?

A. I couldn't very well.

Q. Did Durant authorize you, either individually or as an officer of the company, to do anything about these 250 shares of stock, or did he simply acquiesce in what you said?

A. He acquiesced in what I said, but I don't think he said any-

thing; as far as I know the matter came up and was settled immediately; I don't think there much said about it at the time.

37 Q. You stated that you turned over to the Bell Telephone Company of Missouri the plant and rights and property of the Kansas City Telephone Exchange, which stood you $15,000.

A. I believe that is what I said.

Q. And what else did you turn over?

A. I believe we took possession the same day of the Golden [and] Stock.

Q. And that you estimated at what?

A. I have forgotten the figures.

Q. Isn't it true that the Western Union Telegraph Company was paid $75,000 by the Bell Telephone Company of Missouri for the rights of that company which were surrendered to this company?

A. Yes, sir, but by a subsequent arrangement.

Q. Are the services mentioned in that bill the same services performed by Overall & Judson in the matter we have been talking about? (Paper shown witness.)

A. A portion of them are some that I referred to; that bill includes some other services.

Q. Were any services or advice that you speak of in your examination-in-chief as rendered by Overall & Judson not included in that bill?

A. I can't tell you, sir; all I can tell you is that I paid Overall & Judson something between two and three hundred dollars; the papers will show what it was for; the books of the company will tell.

Q. Any advance that you made was repaid to you?

A. Yes, sir.

Q. All bills to Overall & Judson were ultimately paid by the company?

A. Later on they were.

Mr. HITCHCOCK: The witness volunteered a statement in regard to *parent* Western Union Telegraph Company; he stated that there was stock subscribed by various persons, etc. I don't wish to travel out of the record—out of the issues in this case, but if that is

38 bearing on this case, and I don't think it is, I would like to ask the witness further questions.

The COURT: It does not bear upon the case; it was a volunteer remark and may be stricken out.

Mr. HITCHCOCK: If that remark is stricken out I have nothing further to say.

To which ruling of the court plaintiff then and there excepted.

Redirect examination by Mr. POWERS:

Q. Questions have been propounded to you by counsel in reference to what was said by you when you relinquished your interest in these 250 shares of stock; you were asked whether you didn't afterwards have some conversation with the attorneys who were em-

ployed in the preparation of the organization, and at which Mr. Durant and Mr. Smith were present. I will get you to state whether your going to counsel and the consultations that were had at subsequent times was for the purpose of carrying out that arrangement that you had made with Durant.

A. It was, and I don't remember of Mr. Smith being present when we went to counsel.

Q. Then I understand you to say that whatever arrangement was made about the stock was consummated at the time of your first interview upon that subject.

A. Yes, sir.

Q. The rest was simply carrying that idea into execution?

A. Yes, sir; we went to see counsel in order to carry out the arrangement.

Q. You say that at a subsequent time—some months afterwards—you had some conversation in reference to this 250 shares of
39 stock on the occasion of fixing up matters with the Western Union Telegraph Company?

A. Yes, sir.

Q. State whether such conversation was had between you and a stockholder or stockholders of the Bell Telephone Company of Missouri.

Defendant objects as incompetent. Objection sustained. Exception then and there taken.

Q. You were shown by counsel drafts or what purports to be minutes of the company; part of it is written in ink and there are certain interlineations, additions and alterations in pencil. I understand you to say that you never saw these papers before?

A. Not to my recollection.

Q. State whether any of these minutes were prepared by your direction.

A. I will state in a general way that none of the minutes were prepared under my direction, so these could not have been; it was not prepared under my direction. I should think it was prepared by an attorney from the reading of it.

Mr. POWERS: The witness has identified this paper entitled "Transfer of interest," and the counsel has stated that he accepts this copy as the original instrument. I will read it in evidence (reading):

"BOSTON, *Nov.* 29, 1879.

"Western Union Telegraph Co., New York.

"GENTLEMEN: You will please transfer to Mr. H. H. Eldred all the interest you hold in the companies operating the exchanges or in the exchange at Kansas City and Saint Louis, which, under the contract with this company, you have agreed to transfer to it, Mr. Eldred assuming any and all obligations as to compensation that would be binding upon this company if the stock or interest were transferred to it.

thing; as far as I know the matter came up and was settled immediately; I don't think there much said about it at the time.

37 Q. You stated that you turned over to the Bell Telephone Company of Missouri the plant and rights and property of the Kansas City Telephone Exchange, which stood you $15,000.

A. I believe that is what I said.

Q. And what else did you turn over?

A. I believe we took possession the same day of the Golden [and] Stock.

Q. And that you estimated at what?

A. I have forgotten the figures.

Q. Isn't it true that the Western Union Telegraph Company was paid $75,000 by the Bell Telephone Company of Missouri for the rights of that company which were surrendered to this company?

A. Yes, sir, but by a subsequent arrangement.

Q. Are the services mentioned in that bill the same services performed by Overall & Judson in the matter we have been talking about? (Paper shown witness.)

A. A portion of them are some that I referred to; that bill includes some other services.

Q. Were any services or advice that you speak of in your examination-in-chief as rendered by Overall & Judson not included in that bill?

A. I can't tell you, sir; all I can tell you is that I paid Overall & Judson something between two and three hundred dollars; the papers will show what it was for; the books of the company will tell.

Q. Any advance that you made was repaid to you?

A. Yes, sir.

Q. All bills to Overall & Judson were ultimately paid by the company?

A. Later on they were.

Mr. HITCHCOCK: The witness volunteered a statement in regard to *parent* Western Union Telegraph Company; he stated that there was stock subscribed by various persons, etc. I don't wish to travel out of the record—out of the issues in this case, but if that is

38 bearing on this case, and I don't think it is, I would like to ask the witness further questions.

The COURT: It does not bear upon the case; it was a volunteer remark and may be stricken out.

Mr. HITCHCOCK: If that remark is stricken out I have nothing further to say.

To which ruling of the court plaintiff then and there excepted.

Redirect examination by Mr. POWERS:

Q. Questions have been propounded to you by counsel in reference to what was said by you when you relinquished your interest in these 250 shares of stock; you were asked whether you didn't afterwards have some conversation with the attorneys who were em-

ployed in the preparation of the organization, and at which Mr. Durant and Mr. Smith were present. I will get you to state whether your going to counsel and the consultations that were had at subsequent times was for the purpose of carrying out that arrangement that you had made with Durant.

A. It was, and I don't remember of Mr. Smith being present when we went to counsel.

Q. Then I understand you to say that whatever arrangement was made about the stock was consummated at the time of your first interview upon that subject.

A. Yes, sir.

Q. The rest was simply carrying that idea into execution?

A. Yes, sir; we went to see counsel in order to carry out the arrangement.

Q. You say that at a subsequent time—some months aftewards—you had some conversation in reference to this 250 shares of
39 stock on the occasion of fixing up matters with the Western Union Telegraph Company?

A. Yes, sir.

Q. State whether such conversation was had between you and a stockholder or stockholders of the Bell Telephone Company of Missouri.

Defendant objects as incompetent. Objection sustained. Exception then and there taken.

Q. You were shown by counsel drafts or what purports to be minutes of the company; part of it is written in ink and there are certain interlineations, additions, and alterations in pencil. I understand you to say that you never saw these papers before?

A. Not to my recollection.

Q. State whether any of these minutes were prepared by your direction.

A. I will state in a general way that none of the minutes were prepared under my direction, so these could not have been; it was not prepared under my direction. I should think it was prepared by an attorney from the reading of it.

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40 "We have made an agreement with Mr. Eldred for those cities for the term of ten years.

"(Signed) Yours truly,

"W. H. FORBES, *President.*"

Plaintiff read in evidence from the first minute-book of the Bell Telephone Company of Missouri as follows, to wit:

This indenture, made this 20th day of December, A. D. 1879, by and between the Bell Telephone Company of Missouri, of the first part, and the American District Telegraph Company of St. Louis, of the 2nd part, both corporations organized and existing under and by virtue of the laws of the State of Missouri, with power to construct, own, operate, and maintain lines of telephone and magnetic telegraph, witnesseth: That whereas it is considered to be for the advantage of each of the parties hereto that the property, business, rights, and franchises of each of said parties should be united and consolidated and be owned and worked in connection; and

Whereas the capital stock of the party of the first part amounts to $400,000.00, divided into 4,000 shares of $100.00 each; and

Whereas the capital stock of the party of the second part amounts to $25,000.00, divided into 500 shares of $50.00 each; and

Whereas the party of the first part has purchased and is now owner of 250 shares of its capital stock; and

Whereas it is mutually considered and agreed by the parties above named that the aggregate of two shares of the capital stock of the party of the 2nd part is the same as the value of one share of the stock of the party of the first part; and

Whereas it is understood and agreed that the terms of such consolidation shall be the exchange of shares in each of the said

41 two parties for shares of the consplidated corporation in due and just proportions:

Now, therefore, in consideration of the premises and of the several covenants hereinafter mentioned by the party of the first part and the party of the second part, respectively, to be performed it is hereby mutually stipulated and agreed—

First. The terms and conditions of this agreement shall be that from and after the consummation of this agreement and act of union and consolidation by the corporate parties hereto and filing the same, duly certified, in the office of the secretary of state of the State of Missouri the stockholders of the corporations parties to this agreement shall be stockholders, respectively, in the corporation hereby created and established, and upon the presentation and surrender for cancellation, as hereinafter provided, of the certificates of shares so holden by them, either of the aforesaid corporations, they shall have issued to them, respectively, certificates of shares in the consolidated company distributed as follows: For each share of the capital stock of the party of the first part the holder thereof shall receive one share of the stock of said new corporation, each of the par value of $100.00; for each two shares of the capital stock of the party of the second part the holders thereof shall receive one share

of the stock of said new corporation, each of the par value of $100.00.

Second. The mode of carrying this consolidation into effect shall be as follows, to wit: On the 20th day of December, A. D. 1879, the shareholders of each of the parties hereto shall meet at No. 214 North 6th St., in the city of St. Louis and State of Missouri, for the election of directors and other officers of the new corporation provided for by this agreement. All shareholders in either of said
42 corporations, parties to this agreement, shall be admitted to vote at said election as shareholders in the consolidated corporation in person or by proxy, each share entitling the holder thereof to one vote; the directors there chosen shall be the directors of the consolidated corporation, and immediately upon their organization shall assume, enjoy, and possess all powers, rights, and privileges now held and enjoyed by the board of directors of either of said corporations, parties hereto, and thereupon, forthwith, all property, rights, and franchises of whatsoever name or nature belonging to the parties of the first and second part-, or either of them, shall pass to and be vested in the said new corporation, and the parties hereto of the first and second part- shall forever cease and determine.

Third. The name of such new corporation shall be "The Bell Telephone Company of Missouri."

Fourth. The number of directors of such consolidated corporation shall be five. They shall choose from their own number a president and vice-president, and shall appoint such other officers as may from time to time be required. They shall have power to establish and amend by-laws, one of which shall fix the time and place for annual meetings. The board first chosen shall hold office until the next annual meeting of the corporation, and all officers of the corporation shall serve during the pleasure of the board.

Fifth. The location of the principal office or place of business of such consolidated company shall be in the city of Saint Louis, and the name of its authorized agent thereat is George F. Durant.
43 Sixth. The number and amount of shares of the capital stock of such consolidated company shall be 4,000 shares of $100 each. The manner of converting the capital stock of each of said first-named corporations into that of the new consolidated corporation shall be that the present outstanding certificates of stock in the said two first-named corporations shall be surrendered to the president and secretary of said new consolidated corporation, who shall thereupon issue and deliver to the persons surrendering certificates of stock of the party of the first part new certificates representing equal number of shares in the said consolidated company, and to the persons surrendering certificates of stock of the party of the second part new certificates representing one-half the number thereof of shares in said consolidated company.

44 Plaintiff rests.

Thereupon the defendants, to sustain the issues on its part, introduced testimony as follows, to wit:

Deposition of Geo. F. Durant.

GEORGE F. DURANT, called for defendant, and being sworn, testified as follows:

Direct examination by HENRY HITCHCOCK, Esq.:

Q. What is your relation to the defendant, the Bell Telephone Company of Missouri?

A. I am one of its directors and its general manager.

Q. How long have you been connected with that company?

A. Ever since its organization.

Q. Did you take part in the organization of December third?

A. Yes, sir.

Q. You were one of the persons to whom stock was assigned in the preceding company by Mr. Eldred?

A. Yes, sir.

Q. How much money was paid in by any of those original five stockholders to the Bell Telephone Company of Missouri for the stock so assigned?

A. Not one dollar. You asked me in regard to the stock assigned by Mr. Eldred. Mr. Eldred did not assign stock; he assigned his interest—not any stock—to us, but assigned us the proportion of his interest in this concession made to him by the National Bell Company. He assigned to me $\frac{754}{4000}$. Subsequent to that the articles of association were made out and the association formed.

Q. State whether or not at the time the articles of association were made out and filed any transfer had been made by the Kansas City Telephonic Exchange, the Gold and Stock Exchange, or the American District Telegraph Company, or either one of them, of
45 any rights which they then had as early as the third of December.

A. No, sir; I am not prepared to say about the transfer of rights, but no transfer of property had been made.

Q. Was there any property turned over or assigned at that time?

A. Not to the Bell Telephone Company of Missouri.

Mr. DURANT:

Q. Will you please state your recollection of what took place in reference to any proposition or agreement by Mr. Eldred to permit or authorize the issue of 250 shares of stock subscribed for by him, or allotted to him, to the shareholders of the American District Telegraph Company—how it came about, and what happened?

A. It came about after making some progress towards organization. We found—I think it was by consultation with Overall & Judson—that the only way, or the more speedy way, in which the American District Telegraph Company's property franchise could be acquired was by consolidation, and the only way in which consolidation could be effected would *be* necessarily require 250—of stock, equal to its $25,000 capital. The stock of the Bell Telephone Company had all been allotted to Mr. Eldred, Kent, Storke, Smith, and

myself, and after some little talk about it—very brief indeed—Mr. Eldred suggested that he would give the 250 shares of stock for that purpose. Mr. Smith was present when this occurred at the Sixth-street office, and we then went to the office of Overall & Judson, and I think we took that paper that has been exhibited here——

Q. (Interrupting.) Do you mean this paper? (Paper shown witness.)

A. Yes, sir; that is the paper; and we stated to Mr. Judson the intention of Mr. Eldred to meet the case in that way.

Q. Was Mr. Eldred present?

A. Yes, sir; Mr. Eldred was present in Overall & Judson's office.

46 Q. Before you went with Eldred to Judson's office, state whether any or either of these sheets of paper had been prepared and were then before Mr. Eldred.

A. Yes, sir; these three papers were prepared as a part of the minutes. Eldred saw these papers. They were subject of conversation in Overall & Judson's office when this matter was arranged.

Q. I notice that on the bottom of the page marked "2" a couple of lines are apparently crossed out in pencil.

A. Yes, sir.

Q. State whether, when you, Eldred, and Smith were looking over these three sheets, this crossing out in pencil had been done.

A. No, sir; that was done by Overall & Judson.

Q. The original papers that you and Eldred examined were those three papers?

A. Yes, sir.

Q. How does it come that this interlineation of a part of a page in pencil was had?

A. That was the solution that we made of this difficulty, as I have stated. In order to effect the consolidation of the American District Telegraph Company with the Bell Telephone Company of Missouri somebody must put up 250 shares of stock, and Eldred volunteered to do it, and in accordance with his volunteer offer of stock we stepped over to Judson's office to have him arrange the matter on that basis, and Judson took this document and interlined that page.

Q. Did Mr. Eldred see this pencil page also?

A. I don't know whether Mr. Eldred saw that pencil page or not, but I think he did. I think Mr. Judson drew up that pencil part of it, and after a little conversation put that last clause in.

Q. In whose possession have these papers been since that time?

A. In the possession of myself and Mr. Smith, the secretary of the company.

47 Q. Can you state how what is written on these papers, as including the interlineation, or the intermediate page in pencil, compare with the minutes of the company as written out?

Plaintiff objects as incompetent. Objection overruled. Exception then and there taken.

A. The minutes were written from that draft. My impression is that I have compared all of them.

48 *To be Adopted at Meeting of Stockholders and Entered in Minutes.*

Copy.

Whereas the National Bell Telephone Company, a corporation duly organized under the laws of the State of Massachusetts, has, by agreement with H. H. Eldred, granted to said Eldred certain valuable rights, concessions, and franchises, under what are known as the Bell telephone and other patents (owned and controlled by said Co.), said agreement being contained in written propositions duly accepted by said Eldred, and to be fully set forth in contracts to be duly executed by the said National Bell Telephone Company pursuant to said agreements;

Whereas the said rights, concessions, and franchises so acquired by said Eldred were by him transferred to the parties hereinafter named, and with interests in the proportions hereinafter set forth, as follows:

H. L. Starke	750
G. H. Kent	250
E. A. Smith	20
Geo. L. Durant	750
H. L. Eldred	2,230
	4,000

Said parties being the owners with said interests at time of the incorporation of this company, and being the sole corporators of this company; and

Whereas said exclusive rights, concessions, and franchises constitute property rights of great value to this corporation to issue in due form certificates of said stock to said partie- above named, and to do and perform all acts necessary and proper for the full acceptance on the part of this company of the aforesaid

49 agreements and propositions of the National Bell Telephone Company in the execution of contracts or otherwise under its charter:

Resolved, That, in consideration of the complete assignment to this corporation in due form of all the right, title, and interest of said parties in said exclusive rights, concessions, and franchises, so that the same may be as fully possessed, enjoyed, and enforced as by said Eldred, this corporation hereby allots and sets apart to said parties 4,000 full-paid shares of its capital stock, constituting the authorized capital stock of said company, to each of said parties a proportionate part of said 4,000 shares according to his interest in said rights, concessions, and franchises, and according to the subscription of each to the capital stock of this company, and constituting a full payment of said subscription:

H. L. Storke	750 shares.
G. H. Kent	250 "
E. A. Smith	20 "
George L. Durant	750 "
H. L. Eldred	2,230 "
	4,000

50 And in consideration of the agreement of said H. H. Eldred to surrender to this company 250 shares of the stock so allotted to him for the purpose of effecting a consolidation with the American District Telegraph Company of St. Louis a certificate of 1,980 shares shall be issued to said Eldred, and the said 250 shares so surrendered shall be retained in the possession of this company, subject to issuance hereafter (for said purpose of consolidation), and the officers of the company are directed——

51 Q. When Eldred volunteered to give this 250 shares of stock, what if anything was said in that conversation about any purchase by the company of this stock from him, or any payment for it?

A. There was nothing said at all about any purchase; Mr. Eldred volunteered to give the stock for that purpose; I think his exact words were "I will give that out of my lot."

Q. It was after that that you went back to Judson and had that paper prepared?

A. Yes, sir; that is the additional one.

Q. When did the company or its officers first hear from Mr. Eldred as to any claim like this?

Plaintiff objects as incompetent. Objection overruled. Exception then and there taken.

A. Some time last October—1881.

Q. What was done in point of fact in regard to the shares of stock of the American District Telegraph Company?

A. They were taken up and the stock of the Bell Telephone [Company] of Missouri issued in place of it.

Q. What consideration did the Bell Telephone Company receive for the 250 shares of stock given by Mr. Eldred?

A. They received all the property of the American District Telegraph Company.

Q. What was that property?

A. That property consisted of what was known as the Saint Louis Telephonic Exchange. There were some five or six hundred subscribers that were paying $80 a year; it was a very valuable business, and the Bell Telephone Company of Missouri, by consolidation in that way, acquired that business. There were a large number of instruments; it was a complete telephonic exchange.

Q. Were you present at a meeting of the officers of the Bell Telephone Company of Missouri on December 19th, the minutes of which purport to be recorded in that book? (Book shown witness).

A. Yes, sir.

52 Q. Who else were present?

A. Mr. Eldred and Mr. Smith were present.

Q. Was that the meeting at which this question of 250 shares was discussed?

A. That was not discussed at a meeting. It was discussed in the office of the company. We were not in session at the time.

Q. Then it was a discussion between individuals?

A. Yes, sir.

Q. And this offer of Eldred's was made in an individual conversation?

A. Yes, sir; with Smith and myself.

Q. And it was subsequent that this stockholders' meeting was held the records of which you have there?

A. Yes, sir.

Q. Please read the proceedings of that meeting of December 19th, 1879.

(Witness reads from minute-book of the Bell Telephone Company of Missouri as follows:)

ST. LOUIS, *Dec. 19th*, 1879.

Pursuant to adjournment the stockholders met at 9 a. m.

Present: Messrs. Durant, Eldred, and Smith.

On motion Mr. Eldred was elected chairman, vice Durant, resigned.

On motion of Mr. Durant the following resolution was unanimously adopted:

Whereas the National Bell Telephone Company (a corporation duly organized under the laws of the State of Massachusetts) has, by agreement with H. H. Eldred, granted the said Eldred certain valuable rights, concessions, and franchises under what are known as the Bell telephone patents and other patents owned and controlled by the said company, said agreement being contained in a written proposition duly accepted by the said Eldred and to be fully set forth in contracts to be duly executed by the said National Bell Telephone Company, pursuant to said agreements; and

53 Whereas the said rights, concessions, and franchises so acquired by said Eldred were by him transferred to the parties hereinafter named, with interests in the proportion hereinafter set forth, as follows: H. L. Storke, 750; Geo. H. Kent, 250; E. A. Smith, 20; Geo. F. Durant, 750; H. H. Eldred, 2,230; total, 4,000; said parties being the owners of said interests at the time of the incorporation of this company and being the sole incorporators of this company; and

Whereas said exclusive rights, concessions, and franchises constitute property rights of great value to this corporation under its charter:

Resolved, That in consideration of the complete assignment to this corporation in due form of all the rights, title, and interest of said parties in said exclusive rights, concessions, and franchises, so that

the same may be as fully possessed, enjoyed, and enforced as by said Eldred, this corporation hereby allots and sets apart to said parties 4,000 full-paid shares of its capital stock, constituting the authorized capital stock of said company, to each of said parties a proportionate part of said 4,000 shares, according to his interest in said rights, concessions, and franchises, and according to the subscription of each to the capital stock of this company, and constituting a full payment of said subscription: H. L. Storke, 750 shares; George H. Kent, 250 shares; E. A. Smith, 20 shares; George F. Durant, 750 shares; H. H. Eldred, 2,230 shares; and in consideration of the agreement of H. H. Eldred to surrender to this company 250 shares of stock so allotted to him for the purpose of effecting a consolidation with the American District Telegraph Company of St. Louis a certificate of 1,980 shares shall be issued to said Eldred, and the said 250 shares so surrendered shall be retained in the possession of this company, sub-
54 ject to issuance hereafter for said purpose of consolidation; and the officers of the company are directed to issue in due form certificates of said stock to said parties above named, and to do and perform all acts necessary and proper for the full acceptance on the part of this company of the aforesaid agreements and propositions of the National Bell Telephone Company in the execution of contracts or otherwise.

Q. You saw the certificates which I showed Mr. Eldred this morning, did you not?

A. Yes, sir.

Q. What papers are those, and what connection have they with the resolution you have just read? (Papers shown witness.)

A. These are all the original certificates, five in number, embracing 4,000 shares, or, rather, 3,750.

Q. The certificate issued to Eldred is for how much?

A. For 1,980 shares.

Q. What paper is that I now hand you?

A. That is the stub of the book.

Q. Refer to certificate No. 4; is there any receipt there in connection with it?

A. Yes, sir; it is H. H. Eldred's receipt, December 19th, 1879, for 1,980 shares issued to him; the certificate attached to this was written out with 2,230 shares, and after this alteration was made that certificate was destroyed and another one prepared for 1,980 shares, which were issued to Mr. Eldred.

Q. Why was this 2,230 crossed out on that stub?

A. To correspond with the number of shares actually issued.

Q. Whose signature is that below?

A. Eldred's.

Mr. POWERS: We will admit that.

Q. When this consolidation agreement was carried out what change did it make in the actual condition of the Bell Telephone Company of Missouri?

55 A. It placed all the business in Saint Louis under the control of the Bell Telephone Company of Missouri; there were no more shares of stock than there was before, but there was a very great deal more property than there was before; the American District Telegraph Company plant, as a factor in the property of the Bell Telephone Company of Missouri, was probably equal to all the other interests that were brought into it; the Bell Telephone Company of Missouri would hardly have undertaken to do business in Saint Louis without acquiring the business of the American District Telegraph Company.

Q. Why not?

A. Because the American District Telegraph Company had a franchise from the National Bell Telephone Company to operate business here and the Bell Telephone Company of Missouri had no franchise to operate telephones in Saint Louis at that time.

Q. Was ever any action taken by the directors, or any other officers of the Bell Telephone Company of Missouri as such, with reference to any bargain or agreement with Mr. Eldred for these 250 shares of stock?

A. No, sir; there was never any agreement or action taken on the part of any of the officers of the company; there was not a thing said in regard to these 250 shares of stock by any officer of the company, except what was said at the time Eldred gave the stock to the company in presence of myself and Mr. Smith.

Q. Whose handwriting is that? (Paper shown witness.)

A. I think that is Mr. Judson's, and those three pages, I think, are Mr. Overall's.

Q. Are you confident about that?

A. Yes, sir; it is either one or the other.

Q. How long did Eldred continue to act as president of the Bell Telephone Company of Missouri?

A. For several months.

56 Q. During that time had Mr. Eldred access to this book of minutes?

A. Yes, sir.

Q. Do you happen to know whether he ever examined these minutes?

A. I can't say whether he ever did, but they were always accessible.

Q. Do you know of his making any objection, prior to the latter part of this year, to any statement contained in those minutes?

A. No, sir.

Cross-examination by Mr. POWERS:

Q. I understand you to say that these drafts of minutes were prepared by Mr. Judson, of the firm of Overall & Judson?

A. Yes, sir; Overall & Judson both had a hand in them.

Q. The preparation of the papers necessary to effect this consolidation and the organization of the new company were all prepared by counsel, were they not?

A. By Overall & Judson; yes, sir.

Q. They were employed for the purpose of effecting the consolidation, were they not?

A. An organization; yes, sir.

Q. Had they been the attorneys of any corporation in which you were interested prior to that time?

A. I don't think they had.

Q. Well, what is your best recollection about it?

A. The best of my recollection is that they had not.

Q. Were they not employed by you for the American District Telegraph Company—you were general manager of that company, were you not?

A. I don't think we ever employed them except upon one occasion to furnish a written opinion in regard to a matter that was submitted to them; they were never retained as counsel for the American District Telegraph Company. I think that opinion was all the business they did for that company.

Q. They are still the attorneys of the Bell Telephone Company of Missouri, are they not?

A. No, sir.

Q. Have they not been up to recently?

A. They have not been our attorneys since about — ago, I think.

57 Q. Up to that time they were the attorneys of the company?

A. To the best of my recollection.

Q. Do you remember when these minutes were written in this book that you have examined?

A. Yes, sir.

Q. About when was it?

A. I don't remember the time; it was some little time after this matter had been acted upon by the stockholders and directors; I don't remember the exact time.

Q. Where were they written up?

A. I think they were written up at our office on Olive street.

Q. Do you know by whom that indenture that I read and the one that you read a few moments ago were written?

A. The minutes that I read was written by one of our clerks.

Q. I believe you testified that that was written from memorandum prepared by Mr. Judson?

A. From a copy of that draft which I had prepared.

Q. Were there any papers that were prepared by Mr. Judson copied into that minute-book?

A. Yes, sir; quite a number of them.

Q. What papers were they?

A. Well, nearly all the minutes of the stockholders' and directors' meetings at that time.

Q. Were those papers presented to Mr. Eldred for his approval before they were written up?

A. I don't remember whether they were or not; Mr. Eldred was away a large part of the time.

Q. Then you don't remember whether he was represented or not?

A. I think not.

Q. Have you any recollection whether any other *persons* other than the one you have referred to was presented to Mr. Eldred for his examination and approval?

A. I don't remember whether there was or not; Mr. Eldred had access to all the papers; I don't remember.

Q. I understand you to say that Mr. Eldred had examined
58 and read this document as amended prior to the organization of the company and before it was copied into the minute-book?

A. The contents of that document was read by Mr. Judson in the presence of Eldred and myself.

Q. Do I understand you to say that Mr. Eldred heard that document read just as it is now?

A. I am not prepared to say that.

Q. Do you remember of writing to Mr. Eldred on the 22nd day of December, 1879, in which this clause occurs: "This morning I gave all the papers to Judson, and he is to return them in perfect shape to copy into the books?"

A. I don't remember of writing him that; I wrote him a great many letters.

Q. Look at that and see if that is not your handwriting.

(Paper shown witness.)

A. Yes, sir; it is in my handwriting.

Q. That is a letter that you wrote to Mr. Eldred at that date, is it not?

A. I presume the date is correct; it is my writing at all events.

Q. Is what I have read from that letter a true statement to Mr. Eldred of what you did at that time?

A. Yes, sir; Mr. Judson simply arranged the papers in the order in which they should be entered into the book.

Q. What do I understand as to the cause of this language in this letter: "And he is to return them in perfect shape?" Do I understand that that word "shape" meant simply that he was to number them respectively one, two, three?

A. He was to arrange them, and did so.

Q. That is what you mean by "shape?"

A. Yes, sir.

Q. There was no change of phraseology at all?

A. No, sir.

Q. Do you know whether he did change any of the phraseology or not?

A. He did not. I gave the papers to the clerk to copy, and in doing so the original draft of Overall & Judson's had become disarranged, and I handed those papers over to Judson
59 and asked him to arrange them in proper shape, and he did so, and put a wrapper around each different lot and labelled them.

Q. Have you the other papers that you refer to?

A. Some I have and some I have not; that is the manner in which they were returned to me by Mr. Judson.

Q. Do you know where Mr. Eldred went to immediately after the organization of this company?

A. He went to Kansas City and then to Denver.

Q. After the organization of the company do you know where Mr. Eldred's place of residence was?

A. He did reside in Saint Louis, but——

Q. Don't you know that he sailed for Europe in connection with some interest that he had in Paris at that time?

A. He couldn't have sailed from Saint Louis.

Q. The business affairs of this company were under the management of other parties than Mr. Eldred, were they not?

A. Yes, sir; the secretary had charge of the books, etc., and I had charge of the other departments. I derived the interest that I had in the Bell Telephone Company of Missouri originally from Mr. Eldred.

Q. Look at that letter and see if that is a letter that was written by you to Mr. Storke, one of these parties who was a beneficiary, as well as yourself, in Mr. Eldred's bounty. Is that letter in your handwriting?

(Letter shown witness.)

A. Yes, sir; that is in my handwriting, as far as I have examined it.

Q. Do I understand you to say that Mr. Eldred had 2,330 shares of stock?

A. I didn't say that.

Q. What did you say?

A. I didn't say anything about Mr. Eldred's stock at all; I testified from the stock-book that Mr. Eldred had 1,980 shares of stock.

Q. Mr. Storke was treasurer of the company at one time, was he not?

A. I think he was at one time.

Q. Do I understand you to swear that originally Eldred only had 1,980 shares of stock?

A. Yes, sir.

Q. I would like to have you explain upon what hypothesis
60 you made this statement in this letter to Storke: "Have just received yours of the 6th in regard to surrender of stock. My idea would be to surrender *pro rata* upon the original issue, namely, 2,230 shares; Storke, 750; Kent, 250; Durant, 750; Smith, 20." Explain that.

A. I would like to have that letter.

(Letter shown witness.) "January 8, 1880." I can't tell you now what this letter referred to; there were a great many letters passed between myself and Mr. Storke.

Q. Can't you tell from the tenor of that letter what you meant?

A. It relates to a great many matters. I don't remember the cir-

cumstances under which that letter was written; it is a personal letter from myself to Storke.

Q. Yes, sir; but it was in relation to the business of the company, was it not?

A. That one paragraph relates to the business of the company; I am not sure about that either.

Q. Was there not assumed by Eldred an indebtedness of $55,000 for the amount of money that the Western Union had expended in these exchanges turned over to the Bell Telephone Company of Missouri?

A. Not to my knowledge.

Q. Was not the Bell Telephone Company of Missouri indebted to the Western Union Telegraph Company of New York in round numbers to the extent of $55,000 at the time of the writing of this letter by you to Mr. Storke?

A. We had possession of property that was not paid for.

Q. Was it not a question that had been considered by you and Eldred and other parties—Storke among the rest—as to the advisability of issuing bonds to the extent of some $80,000 to pay this indebtedness off?

A. That was one of Mr. Eldred's schemes.

Q. Is not that one of the bonds that were prepared and engrossed for that purpose? (Paper shown witness.)

A. Yes, sir; that was prepared for that purpose.

61 Defendant objects as going into outside matters.

Q. Wasn't the question that you were considering in this letter the question of subsituting the stock of the company—that is, a *pro rata* surrender of stock in lieu of issuing these bonds—wasn't that the question that you and Mr. Storke were considering?

A. I think very probably; there was a great many questions discussed between Storke and myself by letter.

Q. By whom were these surrenders made?

A. By the original stockholders.

Q. I will ask you if Mr. Eldred, Storke, Smith, Kent, and yourself were not the entire and absolute owners of all the stock except that which went to the American District Telegraph Company stockholders up to about a year and a half ago, with the exception of the 50 shares that Mr. Eldred sold?

A. No, sir; I think that some of Eldred's stock was issued on the 19th of December to other parties.

Q. You refer to the transfer to his wife and mother-in-law, do you not?

A. Yes, sir.

Q. This 1,980 shares of stock were presumed to be Eldred's when you came to divide, were they not?

A. Yes, sir.

Q. Then I understand you to say that this 2,230 shares of stock was the amount of stock that Eldred had in the Bell Telephone Company of Missouri before he transferred the $25,000 of stock to the company; is that it?

A. No, sir; I don't undertake anything of the kind.

Q. Do you mean to say that the words "original issue" do not mean anything?

A. To tell you frankly I cannot tell the circumstances under which that letter was written; I may have had some particular object in writing that letter; I probably had.

62 Q. Very likely. Judge Valliant suggests that I ask this question: Had the stockholders in the American District Telegraph Company consented to accept stock in the new Bell Telephone Company of Missouri in the proportion of one share of the latter for two of the former?

A. The former was $50 a share and the latter $100.

Q. Before Mr. Eldred had agreed to furnish 250 shares of his stock for that purpose had there been some agreement?

A. I think that the only consent of the stockholders was in accordance with the articles of consolidation.

Q. Do you remember whether or not the matter was considered by the stockholders of the American District Telegraph Company before Mr. Eldred made this concession of 250 shares?

A. I think it was.

Q. What is your best recollection as to whether the stockholders had consented to accept stock in the new company in lieu of their old stock?

A. I think their only consent was at a meeting of the stockholders of the American District Telegraph Company which was held on the 19th of December.

Q. This occasion that you speak of, so far as Eldred was concerned, was 15 or 20 days prior to that, was it not?

A. No, sir; I think it was at that date, as near as I can remember.

Q. When was the meeting of the stockholders of the American District held?

A. I think it was the 19th day of December, or the 20th; I don't remember which.

Q. Are you positive that it was not the 20th?

A. I am not; I couldn't tell without referring to the minutes. At the time Eldred gave the company the 250 shares of stock I think his exact words were "Well, I will give that out of my lot." That was after we had discovered that we lacked within 250 shares of enough stock to absorb the capital stock of the American District Telegraph Company.

63 Q. Are you positive that those were his exact words?

A. I will not be positive about it, but that is my best recollection. It was considered a very ordinary transaction at the time. I wouldn't be positive that these were his exact words.

Q. But those were his exact words as you at present recall them?

A. Yes, sir.

Redirect examination by Mr. HITCHCOCK:

Q. Do you mean in answer to the last question to qualify your statement as to the correctness of this letter to Storke?

A. No, sir.

cumstances under which that letter was written; it is a personal letter from myself to Storke.

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Q. But those were his exact words as you at present recall them?

A. Yes, sir.

Redirect examination by Mr. HITCHCOCK:

Q. Do you mean in answer to the last question to qualify your statement as to the correctness of this letter to Storke?

A. No, sir.

Q. What do you mean by saying that is your best impression?

A. That is the best of my recollection.

Q. Have you any recollection *pro* or *con* as to whether anything was said about any agreement, or return, or repayment of——

A. (Interrupting.) No, sir; that was not spoken of, even remotely, in any way.

Q. Mr. Powers asked you whether the stockholders of the American District Telegraph Company assented to the consolidation before accepting, and so on. Look at that paper and state whether you know what occurred in connection with it in reference to any call upon the stockholders of the American District Telegraph Company? (Paper shown witness).

A. Overall & Judson advised us that it would be necessary to call a meeting of the stockholders of the American District Telegraph Company for the purpose of acting upon the articles of consolidation, and it was with some difficulty that we obtained the required number of signers.

Q. How much did Eldred then represent of the stock of the American District Telegraph Company?

A. 259 shares, or a little more than half of the whole.

Q. I understand that you identify these papers as the papers returned by Mr. Judson in perfect shape?

64 A. Yes, sir; Mr. Judson labelled them; stated that such and such papers came in at such and such places, etc.

Q. That is what you referred to in that letter?

A. Yes, sir.

Q. You were asked about the surrender subsequently made and which you say was made by Mr. Eldred on the basis of 1,980 shares?

A. Yes, sir.

Q. Was that any surrender of stock which had anything to do with the purchase of the American District Telegraph Company?

A. No, sir.

Deposition of F. N. Judson.

F. N. JUDSON, called for defendant and being duly sworn, testified as follows:

Direct examination by HENRY HITCHCOCK, Esq.:

My name is F. N. Judson; I am a practicing attorney at this bar and have practiced law here about ten years.

Q. In December, 1879, were you acting as counsel for the Bell Telephone Company of Missouri, the defendant in this suit?

A. The firm of Overall & Judson were employed by the Bell Telephone Company of Missouri—employed by the gentlemen who organized that corporation—to effect the organization for them, and were thereafter employed by the company in matters relating to their organization.

Q. You were not employed by either of these gentlemen for their individual business, were you?

A. No, sir; we understood that we were employed entirely by the corporation and we were paid by the corporation.

65 Q. State if you recollect the circumstances under which these papers were prepared and what connection Mr. Eldred, the plaintiff, had with them and his agreeing to what was put into them or either of them. (Papers shown witness, being the same sheets testified to by witness Durant as the draft from which the minutes were written and hereinbefore set out).

A. This is a draft in my handwriting of a resolution prepared at the request of Mr. Eldred and Durant, and possibly Mr. Smith was present with Eldred and Durant. The resolution was to be adopted at a stockholders' meeting of the company, and certain shares of stock in the new corporation just organized was to be allotted to the several promoters according to their respective interests in certain contracts which they represented that they owned or controlled.

Q. How much stock was to be so allotted under the original instructions that you got?

A. 4,000 shares of $100 each. I was then called upon to prepare a resolution under which the shares could be issued as full-paid shares to these gentlemen according to their respective proportions of interest in these contracts, and they gave me the data on which to proceed. It was distinctly stated and embodied in this resolution that the only consideration given for the shares of stock were the respective interests of the parties in these franchises or contracts, which were said to be controlled by them. This resolution was prepared by myself, I think, about the 19th of December, and I wasn't apprised at that time of the full scheme of

66 consolidation. It was necessary to have 250 shares more of stock to be used in effecting this consolidation in order to take up the outstanding capital of the American District Telegraph Company, which was $25,000, and they stated to me that this resolution didn't answer their purpose, and that it was necessary to make a different provision in order to make it coincide with the scheme of consolidation. Before this resolution was to be adopted Mr. Eldred and Durant came back to the office and stated that that matter of taking up the entire capital stock of the American District Telegraph Company had been arranged by Eldred taking 1,980 shares of stock instead of 2,230, and they wanted to have the resolution modified to conform to that arrangement, and I thereupon sat down and made the proper modifications on this additional pencil page.

Q. After you drew that additional pencil page what did do with the paper—to whom did you give it?

A. My recollection is that I gave all of these papers to Durant—possibly Mr. Smith.

Q. To what extent did the statements made by you in drafting that interpolated page correspond with what Eldred or Durant told you; what did they say as to what you were to write?

A. I can't say what was said to any greater extent than this, that they gave me specific instructions to do just what was done here. That was the extent of the conversation. I remember of being

very particular in telling the gentlemen that it was of the utmost importance that the whole scheme of organization and allot-
67 ment of shares should be definitely acted upon in due form at their meeting. I impressed upon them all the importance of having the resolution that they proposed to adopt prepared in advance and duly offered at their meeting, and, if I mistake not, I was present at the meeting and saw that resolution duly offered and acted upon.

Q. At a formal meeting?

A. Yes, sir; held at their office.

Q. The resolution that you speak of now is one embraced in the draft?

A. Yes, sir.

Q. Do you remember who were present at that meeting?

A. I think Durant, Eldred, and Smith were present. I am inclined to think that the other gentlemen were not here then. I think they had their proxies.

Q. Was that resolution read?

A. I think it was.

Q. In any of these conversations what was said, if anything, in regard to any terms of sale or repayment to Mr. Eldred?

A. Mr. Eldred was certainly present when this instruction was given to me to prepare this part of the resolution. Whether he was present when I suggested the way it was to be done, in the preliminary conversations, I do not know, but when they came back and said that they had agreed upon how it should be done Mr. Eldred and Durant were both there, and I remember of writing this out and explaining it to them at the time, and the instructions I received from Eldred and Durant was to do just what is done, and as to the question of terms between the parties nothing whatever was said that I can recollect further than that the difficulty was
68 to be met by Mr. Eldred taking 250 shares less.

Cross-examination declined.

Deposition of E. A. Smith.

E. A. SMITH, called for defendant, and being duly sworn, testified as follows:

Direct examination by HENRY HITCHCOCK, Esq.:

My name is E. A. Smith, and at present I am the secretary of the Bell Telephone Company of Missouri; I have been secretary of that company ever since its organization.

Q. Were you secretary of the original organization December third?

A. Yes, sir.

Q. Who has had charge of the minutes and acted as secretary in entering up minutes since that time?

A. I have.

Q. Do you recognize that book? (Book shown witness.)

A. I do.

Q. Under whose direction was that entry of the meeting of December 19th made?

A. It was made by the direction of Mr. Eldred and Mr. Durant.

Q. Who wrote up this minute?

A. My clerk.

Q. What materials did you have or furnish him for the purpose?

A. The papers that were shown Mr. Judson; they were gotten up by Mr. Durant and myself and given to the clerk, who wrote them in the book; they were then examined by Durant and myself, and those entries that were necessary to have my signature to were signed by me.

Q. Do you recollect the fact of any such meeting being held as [the one] the minutes of which are recorded here under the head of December 19th?

A. Yes, sir.

69 Q. Those minutes call for the offering of a resolution which Mr. Durant read; was any such resolution offered?

A. Yes, sir.

Q. Who were present at that meeting?

A. Mr. Eldred, Durant, and myself; we had two present to constitute a quorum.

Q. Now, in entering up these proceedings, will you state whether any use was made of this paper which Mr. Judson has identified?

A. The resolution copied here was offered and passed, and then these papers were referred to in making up the minutes in the book; in other words, they were copied.

Q. Do you remember what occurred at any conversation on or about December 19th—the one referred to by Mr. Durant and Mr. Eldred—when this difficulty or question about the American District Telegraph came up and the matter of the 250 shares of stock was discussed?

A. Yes, sir; I was present, and was present at all times in the office. In discussing this matter of consolidation we found that we had struck a snag; that we couldn't take this American District Telegraph in, as we found we would have to do; we found that it would be necessary to provide 250 shares of new stock to absorb that company, and upon considering that Mr. Eldred and Durant went to the office of Overall & Judson.

Q. Was that the first time that they went there?

A. Yes, sir; as soon as they found that the thing had to be done they went to find out how to do it.

Q. You didn't go with them?

A. No, sir.

Q. When they returned what took place?

A. Well, after they found out how to arrange things, while they were over there, they called me over by telephone, and I went

70 over, and was there a short time, and they wanted to know of me who were the most accessible stockholders, and I procured the names for them.

Q. What was said at this conversation at which it has already been testified that a conclusion was reached in regard to turning

over these 250 shares of stock? What did Eldred say about that?

A. I heard Eldred offer to give up the 250 shares of stock.

Q. Can you give the exact words he used?

A. I couldn't give the exact words. I can only say that he made the offer, knowing that it would to be done that way.

Q. What was said, if anything, in regard to any return to him, or consideration to him?

Plaintiff objects.

Q. Was there anything further said?

A. No, sir. Not in regard to that. They went right away and sent notice of consolidation to the parties that night.

Q. Were you present when Judson wrote out this pencil memorandum that you hold in your hand?

(Paper shown witness.)

A. I think not. I wasn't at Overall & Judson's very often to stay any length of time. I simply went there when they sent for me to consult with me about business. I attended to my regular business in the office, except when we had numerous meetings.

Q. Was any action ever taken by the Bell Telephone Company of Missouri, as a corporation, or by its directors, or by any officer of the company, in respect to any agreement with Eldred about this 250 shares of stock?

A. No, sir; I never heard of such a thing.

Q. Was there any resolution ever offered in the board of
71 directors on that subject?

A. No, sir; I never heard of such a thing until this action was commenced.

Cross-examination by Mr. POWERS:

Q. As a matter of fact your interest in this business was not very large, was it?

A. No, sir.

Q. Your duties as secretary required your attention to the business of the office?

A. Yes, sir.

Q. Mr. Durant was manager of the American District Telegraph Company, was he not?

A. Yes, sir, and president.

Q. And Eldred was, with Durant, managing this matter of organization of this new company and all the details pertaining thereto, was he not?

A. Yes, sir; but I was a director of the company and had to be present, and made any suggestion I thought proper.

Q. But the actual management of this business was arranged by Eldred and Durant, was it not?

A. Yes, sir; but mostly in my presence, except when they were with their lawyers.

Q. But it was not a matter that you took an active part in? It

was a passive acquiescence in what these gentlemen did, was it not?

A. I think I took a pretty active part in it.

Q. Didn't you say that you didn't appear at the lawyer's unless you were sent for?

A. Yes, sir; but we didn't hold our meetings at the lawyer's office.

Q. Were not these papers prepared by the attorneys?

A. Yes, sir.

Q. Were all these plans and development of these schemes devised at the meetings of the board of directors or stockholders?

A. Yes, sir; all that were adopted.

Q. They were all planned there?

A. Yes, sir; with the exception of this scheme East.

72 Q. I understand you to say that there was no development of any ideas with reference to the original of the company, or any plans taken for the development of these ideas, other than at the meetings of the stockholders or parties in interest?

A. None that has gone on record.

Q. The records are the records of the corporation as a body, are they not?

A. Yes, sir.

Q. You don't mean to say that there were not conversations had between the parties in interest?

A. I have no doubt that there were a great many conversations that I knew nothing about.

Q. You were secretary of these meetings that you speak of, were you not?

A. Yes, sir.

Q. And you were present at these meetings because of your office as secretary?

A. Yes, sir; secretary and director.

Q. But your official capacity required you to be there to record the minutes of whatever transactions were had?

A. Yes, sir.

Q. The management of these matters by Durant, Eldred, and the attorneys were not matters in which you took any individual interest before the meetings were held?

A. I most certainly did; they generally came into my hands and were examined.

Q. You don't pretend to say that you were present at all the conversations between Durant and Eldred?

A. Probably not; they spent one or two nights together.

Q. Do I understand you to say that you were not present at the time the final arrangement was made between Eldred and Durant with reference to Mr. Eldred transferring to the company his 250 shares of stock?

73 A. I said that I was present when Eldred offered to do that; it was not at a regular meeting; we were examining this thing and talking matters over when we struck this snag, and then we sought Overall & Judson as usual.

Q. But that was when the snag was struck?

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(Paper shown witness.)

A. I think not. I wasn't at Overall & Judson's very often to stay any length of time. I simply went there when they sent for me to consult with me about business. I attended to my regular business in the office, except when we had numerous meetings.

Q. Was any action ever taken by the Bell Telephone Company of Missouri, as a corporation, or by its directors, or by any officer of the company, in respect to any agreement with Eldred about this 250 shares of stock?

A. No, sir; I never heard of such a thing.

Q. Was there any resolution ever offered in the board of
71 directors on that subject?

A. No, sir; I never heard of such a thing until this action was commenced.

Cross-examination by Mr. POWERS:

Q. As a matter of fact your interest in this business was not very large, was it?

A. No, sir.

Q. Your duties as secretary required your attention to the business of the office?

A. Yes, sir.

Q. Mr. Durant was manager of the American District Telegraph Company, was he not?

A. Yes, sir, and president.

Q. And Eldred was, with Durant, managing this matter of organization of this new company and all the details pertaining thereto, was he not?

A. Yes, sir; but I was a director of the company and had to be present, and made any suggestion I thought proper.

Q. But the actual management of this business was arranged by Eldred and Durant, was it not?

A. Yes, sir; but mostly in my presence, except when they were with their lawyers.

Q. But it was not a matter that you took an active part in? It

was a passive acquiescence in what these gentlemen did, was it not?

A. I think I took a pretty active part in it.

Q. Didn't you say that you didn't appear at the lawyer's unless you were sent for?

A. Yes, sir; but we didn't hold our meetings at the lawyer's office.

Q. Were not these papers prepared by the attorneys?

A. Yes, sir.

Q. Were all these plans and development of these schemes devised at the meetings of the board of directors or stockholders?

A. Yes, sir; all that were adopted.

Q. They were all planned there?

A. Yes, sir; with the exception of this scheme East.

72 Q. I understand you to say that there was no development of any ideas with reference to the original of the company, or any plans taken for the development of these ideas, other than at the meetings of the stockholders or parties in interest?

A. None that has gone on record.

Q. The records are the records of the corporation as a body, are they not?

A. Yes, sir.

Q. You don't mean to say that there were not conversations had between the parties in interest?

A. I have no doubt that there were a great many conversations that I knew nothing about.

Q. You were secretary of these meetings that you speak of, were you not?

A. Yes, sir.

Q. And you were present at these meetings because of your office as secretary?

A. Yes, sir; secretary and director.

Q. But your official capacity required you to be there to record the minutes of whatever transactions were had?

A. Yes, sir.

Q. The management of these matters by Durant, Eldred, and the attorneys were not matters in which you took any individual interest before the meetings were held?

A. I most certainly did; they generally came into my hands and were examined.

Q. You don't pretend to say that you were present at all the conversations between Durant and Eldred?

A. Probably not; they spent one or two nights together.

Q. Do I understand you to say that you were not present at the time the final arrangement was made between Eldred and Durant with reference to Mr. Eldred transferring to the company his 250 shares of stock?

73 A. I said that I was present when Eldred offered to do that; it was not at a regular meeting; we were examining this thing and talking matters over when we struck this snag, and then we sought Overall & Judson as usual.

Q. But that was when the snag was struck?

A. Yes, sir.

Q. Were you present when they got off the snag—that is to say, when the scheme was developed by which this stock was to be used for the transfer of the American District Telegraph—were you present at any conversation when that scheme was developed?

A. Yes, sir; that was developed in the 6th-street office.

Q. That was the interview you have testified to when they got into trouble?

A. Yes, sir.

Q. Do you remember of being present at any other interviews when that matter was discussed?

A. I don't remember of this being discussed; they went right to work to carry the thing through; they went to the attorneys and then they went to work to get the names, and there was nothing more done; Mr. Eldred's proposal was closed, and there was nothing said about it that I know of.

Q. That is all you heard of it?

A. Yes, sir.

Q. They struck this snag, and they went over — the attorneys to get them to devise some plan?

A. Yes, sir.

Q. And they then telephoned for you to come over and give them a list of the stockholders?

A. Yes, sir; they came back to the office and got instructions regarding the accessible stockholders of the American District Telegraph Company.

Q. You don't remember any other conversation or remarks on the part of Eldred touching these 250 shares of stock?

A. No, sir.

74 Redirect examination by HENRY HITCHCOCK, Esq.:

Q. I understand that you have spoken of two conversations in your cross-examination, one when the difficulty was discovered and they went to get the advice of their attorneys, and the second one when Eldred made this proposition; is that so?

A. Eldred made the proposition just as soon as they found out that we had to give 250 shares to absorb the stock of the American District Telegraph Company.

Q. They found that out when they first went over to the attorney?

A. Yes, sir; Eldred made the proposition before they went to the attorneys that if we had to give 250 shares he would give it.

Q. You are the secretary of the company?

A. Yes, sir.

Q. You have always authenticated all stocks issued by the Bell Telephone Company of Missouri?

A. Yes, sir.

Q. There has been produced here a certificate of 1,980 shares issued to Eldred?

A. Yes, sir.

Q. Was there ever any certificate issued to him for a larger amount of stock than that?
A. Previous to that?
Q. Yes, sir.
A. No, sir.
Q. Was there ever any certificate issued to him for 2,230 shares?
A. No, sir.

And the above was all the testimony offered upon the trial of said cause.

75 The plaintiff asked the court to give the jury the following instructions, to wit:

If the jury find for the plaintiff they must assess his damages at what they believe from the evidence was the value of the stock at the time it was delivered to defendant, to which they may add interest at the rate of six per cent. per annum from such date as they may find from the evidence a demand was made for payment of the claim by plaintiff on defendant. Rejected.

The jury are instructed that an agreement to accept less than what is due is absolutely void, and if the jury believe from the evidence that the plaintiff was entitled to receive from defendant company 2,230 shares of its stock, and agreed to relinquish to the defendant all claim to 250 of such shares in consideration of his receiving 1,980 shares, that such a contract is absolutely void and such agreement will not preclude the plaintiff from recovering the value of said stock. Rejected.

The court instructs the jury that it is competent for a stockholder to make a contract with the corporation in which he holds stock, and that the fact that the plaintiff was a stockholder in the defendant corporation does not change the rules of law that as between him and the corporation a consideration is necessary to support the contract, and the fact that the plaintiff's stock might be exchanged in value or otherwise affected as all other stock in the corporation would be exchanged or affected, and with no peculiar advantage to the plaintiff not equally shared by all the stockholders does not constitute a sufficient consideration to support a contract between plaintiff & defendant.

76 In order to support a contract of the character stated in the petition it is not necessary in order to entitle the plaintiff to recover that an express contract or agreement to pay was made, but it is sufficient if the jury believe from all the circumstances of the case that such was the understanding between the parties at the time of the transaction. Rejected.

If the jury believe from the evidence that the plaintiff delivered to the defendant the 250 shares of stock in question, to be by the defendant used for its own benefit, and that nothing was said between them on subject of payment for the stock, the law will presume that it was so delivered with the understanding that defendant was to pay plaintiff what it was worth, and thus presumption will prevail until it shall appear from the evidence that it was un-

derstood between the parties that the transaction was a gift. Rejected.

The jury are instructed that a contract must have as one of its essential elements a consideration, and if *its* jury believe from the evidence that the plaintiff advanced to the defendant the stock mentioned in the petition, to be used by defendant for defendant's benefit, and that defendant received and used the same for its benefit, they are instructed that the law implies a promise on the part of the defendant to pay the plaintiff what the market value of such stock was at the time of such delivery & acceptance. Rejected.

77 Each and every one of which instructions were by the court refused, and to the action of the court in refusing the same the plaintiff instantly excepted.

At the request of the defendant the court gave the jury the following instruction, to wit:

The fact is not disputed that about the 19th of December, 1879, the plaintiff, Eldred, consented to and authorized the issue by the Bell Telephone Company of Missouri to other persons previously stockholders in the American District Telegraph Company of 250 shares of stock in the defendant corporation, one share for two, in lieu of stock previously held by such person in said District Telegraph Company; nor is it disputed that such 250 shares of stock *was* so issued to such third persons, and that in consideration thereof the plant, property, and franchises of the American District Telegraph Company came into the possession of the Bell Telephone Company by the consolidation of said two corporations.

The question for the jury to determine is simply whether the plaintiff, Eldred, in authorizing such disposition of said 250 shares of stock, relinquished and surrendered the same to said Bell Telephone Company in consideration of the benefit to be derived by himself with other stockholders therein from the proposed consolidation of the two companies, or whether any agreement was made between said plaintiff, Eldred, and the Bell Telephone Company of Missouri, as a corporation, to the effect that said Eldred should be paid for said stock.

The jury are instructed that the burden of proving that any such agreement was made rests upon the plaintiff; also, that in order to render the defendant corporation liable for said stock it is

78 incumbent upon the plaintiff to prove an agreement by said corporation to account for or return or pay for said stock made by the officers or officer of said corporation authorized as such to make such an agreement.

And the jury are further instructed that no evidence has been offered by the plaintiff to the effect that any officer of the defendant corporation was authorized to make or did make with said plaintiff any such agreement as above mentioned.

To the action of the court in giving said instruction the plaintiff instantly excepted.

The court then orally instructed the jury that under the evidence adduced they could do nothing but find for the defendant; to which action of the court the plaintiff *who* instantly excepted.

Thereupon the jury, in obedience to the instructions of the court, without retiring, rendered a verdict for the defendant.

And afterwards, to wit, on the — day of October, 1882, within four days of the rendition of the verdict & during the same time, the plaintiff filed a motion for a new trial, which was in the words & figures following, to wit:

Motion for New Trial.

In the Circuit Court of the United States for the Eastern District of Missouri. September Term, 1882.

HORACE H. ELDRED
vs.
THE BELL TELEPHONE CO. OF MISSOURI. } 2017.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

79 Now comes the plaintiff and moves the court to set aside the verdict herein & grant him a new trial upon the following grounds, to wit:

1st. The court at the request of the defendant gave the jury improper instructions.

2nd. The court of its own motion gave the jury improper instructions.

3rd. The court refused to give the jury legal & proper instructions asked by the plaintiff.

4th. The instructions given by the court to the jury were erroneous.

5th. The court rejected legal evidence offered by the plaintiff.

6th. The court admitted illegal evidence on the part of defendant against plaintiff's objection.

WARREN & POWERS,
THOROUGHMAN & VALLIANT,
For Pl'ff.

Which motion was afterwards, to wit. on the 30th day of October, 1882, by the court overruled; to which action of the court the plaintiff instantly excepted.

And now, having embodied his exceptions in this his bill of exceptions, the plaintiff tenders the same in open court, and the same is received & signed by his honor, the presiding judge, & ordered to be filed and made a part of the record in this cause, which is done.

Witness the hand & seal of the Honorable Samuel Treat, presiding alone in said court, this 4th day of November, 1882.

SAMUEL TREAT. [SEAL.]

80 Know all men by these presents that we, Horace H. Eldred, as principal,— Edward P. Gray, his security, are held and firmly bound unto the Bell Telephone Company of Missouri in the

full and just sum of five hundred dollars, to be paid to the said Bell Telephone Company of Missouri or its assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately at the September term, 1882, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Horace H. Eldred, plaintiff, and the Bell Telephone Company of Missouri, defendant, judgment was rendered against the said Horace H. Eldred, and the said Horace H. Eldred having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Horace H. Eldred shall prosecute said writ to effect, and answer all damages and costs if — fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

HORACE H. ELDRED. [SEAL.]
THOROUGHMAN & VALLIANT, [SEAL.]
His Attorneys.
E. P. GRAY. [SEAL.]

Approved by—
SAMUEL TREAT, *Judge.*

81 UNITED STATES OF AMERICA, *Eastern District of Missouri,* } ss:

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 2017, of Horace H. Eldred, plaintiff, against Bell Telephone Company of Missouri, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court at office, in the city of St. Louis, in said district, this 15th day of September, in the year of our Lord eighteen hundred and eighty-three.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

Endorsed on cover: E. Missouri C. C. U. S. No. 84. Horace H. Eldred, plaintiff in error, *vs.* The Bell Telephone Company of Missouri. Filed 4th October, 1883.

119-513

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 84.

HORACE H. ELDRED, *Plaintiff in Error*,

v.

THE BELL TELEPHONE COMPANY OF MISSOURI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

No. 84. OCTOBER TERM, 1886.

HORACE H. ELDRED, *Plaintiff in Error*,

v.

THE BELL TELEPHONE COMPANY OF MISSOURI.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT.

This was an action at law, brought by the plaintiff in error, to recover of the defendant in error the value of 250 shares of the capital stock of the defendant company, advanced by plaintiff to defendant, and used by defendant for its own benefit. The petition states, in substance, that plaintiff is a citizen of New York, and defendant a corporation and citizen of Missouri; that on the 19th of December, 1879, at the instance and request of defendant, plaintiff advanced, furnished and delivered to defendant, to be by it accounted for, to plaintiff, 250 shares of the capital stock of the defendant corporation, at the par value of $100 per share, of the personal property of the plaintiff and which was worth $100, or $25,000 for

the whole, and which defendant received from plaintiff and appropriated to its own use, with the understanding that defendant would pay plaintiff for the same what it was worth.

The answer admitted that defendant had received the stock and used it for itself, but averred in substance that it was a gift "or surrender" from plaintiff to defendant, the consideration moving the plaintiff thereto being certain advantages that would accrue to him as a stockholder in defendant by certain use which it was contemplated the defendant should make of it, and denied that it was understood that the defendant was to pay anything for the stock so advanced.

The plaintiff's reply admitted that the stock was furnished to be used by the defendant, but averred that the object was for the defendant's own, sole use and benefit, and no peculiar benefit to plaintiff which was not in equal proportion shared by all the stockholders.

The question presented by the pleadings was whether the transaction was an advancement of the stock to the defendant, with the understanding that it was to pay the plaintiff for the same, or was it a voluntary gift from plaintiff to defendant.

After the evidence was all in, the Court by instructions took the case from the jury and instructed them to render a verdict for the defendant, on the ground that there was no evidence tending to prove the plaintiff's side of the issue, which was done, and judgment followed accordingly.

The evidence adduced was in substance as follows: —

The defendant, a corporation, was duly organized under the laws of the State of Missouri, on or about Dec. 3, 1879, with a capital stock of $400,000, divided into 4,000 shares of $100 each.

At this time it had but five stockholders, their names and holdings being as follows: —

H. L. Storke owned	750 shares
G. H. Kent owned	250 shares
E. A. Smith owned	20 shares
G. F. Durant owned	750 shares
Plaintiff in error owned	2,230 shares
Total	4,000 shares

Appellant being president, Durant, vice-president and general manager, Smith, secretary, and Storke, treasurer.

The American District Telegraph Company owned a complete and very valuable telephonic exchange in St. Louis with six hundred subscribers, each paying an annual rental of $80; its capital stock was $25,000.

On Dec. 19, a consolidation was agreed upon between the two corporations, and a consultation was held by plaintiff in error, Durant and Smith, with their counsel, as to how this could best be brought about and were advised by counsel:

"That the only way in which such consolidation could best be effected would necessarily require 250 shares of stock equal to the American District Telephone Company's $25,000 capital."

(Durant's testimony, Record, p. 28.) After some consultation between plaintiff in error, Durant and Smith (Kent and Storke being in New York, so that no arrangement for contribution could be made) (Record, p. 10), plaintiff in error agreed to advance the 250 shares necessary for the purpose of such consolidation. This stock was subsequently issued by the defendant to the stockholders of the American District Company as stipulated in the deed of consolidation

between the two corporations, duly executed, which recited the purchase of these shares of stock by appellant and terms of their exchange, the scheme of consolidation being thereby fully carried out.

The minutes of the meeting of the stockholders of defendant, held on the 19th, appear in the record, p. 32, from which the following extract is made: —

"On motion of Mr. Durant, the following resolution was unanimously adopted: . . . In consideration of the agreement of H. H. Eldred to surrender to this company 250 shares of stock so alloted to him for the purpose of effecting a consolidation with the American District Telegraph Company of St. Louis, a certificate of 1980 shares shall be issued to said Eldred, and the said 250 shares so surrendered shall be retained in the possession of this company subject to insurance hereafter for said purpose of consolidation."

From the indenture of consolidation between the defendant corporation and the American District Telegraph Company (Record, p. 26), the following extract is made: —

"Whereas, the party of the first part (defendant corporation) has purchased, and is now owner of 250 shares of its capital stock,"

therefore, etc. About this time the stock was worth par (Record, p. 19), and at the time of the trial the company's stock was worth $115 per share, or $15 premium.

On Nov. 29, 1879, appellant, who was the general manager of the telephone department of the Western Union Telegraph Company of New York, concluded an arrangement with the corporation and the National Bell Telephone Company of Boston, whereby he became the ostensible owner of the Kansas City Telephone Exchange, the Western Union Exchange of Kansas City, the Gold and Stock Ex-

change at St. Louis, contracts and licenses with the National Bell Telephone Company, and 263 shares out of 500 of the capital stock of the American District Telegraph Company at St. Louis, the terms of which were the repayment to the Western Union Telegraph Company of New York the amount these properties had cost that corporation, which repayment the defendant subsequently made to that corporation, amounting to $75,000.

Appellant also advanced about six thousand dollars to pay the expenses of starting the company, and between two and three hundred dollars to attorneys for services in securing its organization; these sums were repaid to appellant some months after the organization of defendant was effected; they were advanced and accepted as informally, and in the same manner of business, and at about the same time, as the 250 shares of stock, and were all used for the exclusive use and benefit of the defendant.

The Answer

of the defendant avers: —

"That on or about Dec. 19, 1879, said plaintiff, who had previously become entitled to receive from this defendant, as one of the original corporators thereof, a total of 2,230 shares of said stock, did himself expressly agree to relinquish and did relinquish and surrender to this defendant his right to receive from said defendant 250 shares of said stock; that said agreement was voluntarily made by plaintiff at his own instance and in consideration of certain benefits to him, said plaintiff, as a stockholder in said company, which was expected to accrue to him from such surrender of said 250 shares of stock to said corporation, by enabling said defendant corporation therewith to acquire from third parties for the benefit of all the stockholders in the defendant corporation, including said plaintiff, certain valuable rights and property for the prosecution of its business and purposes."

The Replication sets forth: —

"That true it is that at the time plaintiff delivered to defendant said 250 shares of stock, it was contemplated between both parties to said contract that the defendant would use said stock in the purchase or exchange from third parties of certain valuable rights and property; but plaintiff avers that said rights and property were to be acquired by the defendant in its own name and for its own and sole use, and with no particular benefit to the plaintiff which would not in equal proportion be shared by all the stockholders."

After the evidence had been submitted to the jury, the following instructions were asked on the part of the plaintiff and refused by the Court: —

"If the jury find for the plaintiff, they must assess his damages at what they believe from the evidence was the value of the stock at the time it was delivered to defendant, to which they may add interest at the rate of six per cent per annum from such date as they may find from the evidence a demand for payment of the claim by plaintiff on defendant.

"The jury are instructed that an agreement to accept less than what is due is absolutely void; and if the jury believe from the evidence that the plaintiff was entitled to receive from the defendant company 2,230 shares of its stock, and agreed to relinquish to the defendant all claim to 250 of such shares in consideration of his receiving 1,980 shares, that such a contract is absolutely void, and such agreement will not preclude the plaintiff from recovering the value of said stock.

"The Court instructs the jury that it is competent for a stockholder to make a contract with the corporation in which he holds stock, and that the fact that the plaintiff was a stockholder in the defendant corporation does not change the rules of law; that as between him and the corporation a consideration is necessary to support the contract, and the fact that the plaintiff's stock might be enhanced in value or other-

wise affected, as all other stock in the corporation would be enhanced or affected, and with no peculiar advantage to the plaintiff not equally shared by all the stockholders, does not constitute a sufficient consideration to support a contract between plaintiff and defendant.

"In order to support a contract of the character stated in the petition, it is not necessary in order to entitle the plaintiff to recover, that an express contract or agreement to pay be made, but it is sufficient if the jury believe from all the circumstances of the case that such was the understanding between the parties at the time of the transaction.

"If the jury believe from the evidence that the plaintiff delivered to the defendant the 250 shares of stock in question, to be by the defendant used for its own benefit, and that nothing was said between them on subject of payment for the stock, the law will presume that it was so delivered with the understanding that defendant was to pay plaintiff what it was worth, and this presumption will prevail until it shall appear from the evidence that it was understood between the parties that the transaction was a gift.

"The jury are instructed that a contract must have as one of its essential elements a consideration, and if its jury believe from the evidence that the plaintiff advanced to the defendant the stock mentioned in the petition, to be used by defendant and for defendant's benefit, and that defendant received and used the same for its benefit, they are instructed that the law implies a promise on the part of the defendant to pay the plaintiff what the market value of such stock was at the time of such delivery and acceptance."

Excepted to by plaintiff.

At the request of defendant, the Court gave the jury the following instruction, to wit: —

"The fact is not disputed that about the 19th of December, 1879, the plaintiff, Eldred, consented to and authorized the issue by the Bell Telephone Company of Missouri to other persons previously stockholders in the American District Telegraph Company, of 250 shares of stock in the defendant corporation, one share for two in lieu of stock previously held by such person in said District Telegraph Company; nor is it disputed that such 250 shares of stock was so issued

to such third persons, and that in consideration thereof the plant, property and franchises of the American District Telegraph Company came into the possession of the Bell Telephone Company by the consolidation of said two corporations."

"The questionf or the jury to determine is simply whether the plaintiff, Eldred, in authorizing such disposition of said 250 shares of stock, relinquished and surrendered the same to said Bell Telephone Company in consideration of the benefit to be derived by himself with the other stockholders therein from the proposed consolidation of the two companies, or whether any agreement was made between said plaintiff, Eldred, and the Bell Telephone Company of Missouri, as a corporation, to the effect that said Eldred should be paid for said stock."

"The jury are instructed that the burden of proving that any such agreement was made rests upon the plaintiff; also, that in order to render the defendant corporation liable for said stock, it is incumbent upon the plaintiff to prove an agreement by said corporation to account for, or return, or pay for, said stock made by the officers or officer of said corporation authorized as such to make such an agreement.

"And the jury are further instructed that no evidence has been offered by the plaintiff to the effect that any officer of the defendant corporation was authorized to make or did make with said plaintiff any such agreement as above mentioned."

Excepted to by plaintiff.

The Court then orally instructed the jury that under the evidence adduced, they could do nothing but find for the defendant.

Excepted to by plaintiff.

ERRORS.

First. The Court erred in refusing to give the jury the instructions asked by plaintiff's attorney in each and all of their request (pp. 47 and 48 of the printed record), viz.: —

"If the jury find for the plaintiff, they must assess his damages at what they believe from the evidence was the value of the stock at the time it was delivered to defendant, to which they may add interest at the rate of six per cent per annum from such date as they may find from the evidence a demand was made for payment of the claim by plaintiff on defendant.

"The jury are instructed that an agreement to accept less than what is due is absolutely void, and if the jury believe from the evidence that the plaintiff was entitled to receive from the defendant company 2,230 shares of its stock, and agreed to relinquish to the defendant all claim to 250 of such shares in consideration of his receiving 1,980 shares, that such contract is absolutely void, and such agreement will not preclude the plaintiff from recovering the value of said stock."

"The Court instructs the jury that it is competent for a stockholder to make a contract with the corporation in which he holds stock, and that the fact that the plaintiff was a stockholder in the defendant corporation does not change the rules of law; that as between him and the corporation a consideration is necessary to support the contract, and the fact that the plaintiff's stock might be enhanced in value or otherwise affected, as all other stock in the corporation would be enhanced or affected, and with no peculiar advantage to the plaintiff not equally shared by all the stockholders, does not constitute a sufficient consideration to support a contract between plaintiff and defendant.

"In order to support a contract of the character stated in the petition, it is not necessary in order to entitle the plaintiff to recover that an express contract or agreement to pay be made, but it is sufficient if the jury believe from all the circumstances of the case that such was the understanding between the parties at the time of the transaction.

"If the jury believe from the evidence that the plaintiff delivered to the defendant the 250 shares of stock in question, to be by the defendant used for its own benefit, and that nothing was said between them on the subject of payment for the stock, the law will presume that it was so delivered with the understanding that the defendant was to pay plaintiff what it was worth, and this presumption will prevail until

it shall appear from the evidence that it was understood between the parties that the transaction was a gift.

"The jury are instructed that a contract must have as one of its essential elements a consideration, and if the jury believe from the evidence that the plaintiff advanced to the defendant the stock mentioned in the petition to be used by defendant for defendant's benefit, and that defendant received and used the same for its benefit, they are instructed that the law implies a promise on the part of the defendant to pay the plaintiff what the market value of such stock was at the time of such delivery and acceptance."

Second. The Court erred in giving the jury the instructions asked for by the defendant's attorneys (p. 48 of the printed record), viz.: —

"The fact is not disputed that about the 19th of December, 1879, the plaintiff, Eldred, consented to and authorized the issue by the Bell Telephone Company of Missouri, to other persons previously stockholders in the American District Telegraph Company, of 250 shares of stock in the defendant corporation, one share for two in lieu of stock previously held by such person in said District Telegraph Company; nor is it disputed that such 250 shares of stock was so issued to such third persons, and that in consideration thereof the plant, property and franchises of the American District Telegraph Company came into the possession of the Bell Telephone Company by the consolidation of said two corporations.

"The question for the jury to determine is simply whether the plaintiff, Eldred, in authorizing such disposition of said 250 shares of stock, relinquished and surrendered the same to said Bell Telephone Company, in consideration of the benefit to be derived by himself with other stockholders therein from the proposed consolidation of the two companies, or whether any agreement was made between said plaintiff, Eldred, and the Bell Telephone Company of Missouri, as a corporation, to the effect that said Eldred should be paid for said stock.

"The jury are instructed that the burden of proving that any such agreement was made rests upon the plaintiff; also, that in order to render the defendant corporation liable for

said stock it is incumbent upon the plaintiff to prove an agreement by said corporation to account for, or return, or pay for, said stock made by the officers, or officer, of said corporation authorized as such to make such an agreement.

"And the jury are further instructed that no evidence has been offered by the plaintiff to the effect that any officer of the defendant corporation was authorized to make, or did make, with said plaintiff any such agreement as above mentioned."

Third. The Court below erred in refusing to permit the jury to pass upon controverted questions of fact, and in instructing the jury, on its own behalf (p. 48 of the printed record), viz.: —

"That under the evidence adduced, they could do nothing but find for the defendant."

The jury should have been allowed to determine, under proper instructions of the Court, whether, under all the facts and circumstances, the defendant incurred a liability to plaintiff to return the shares of stock on demand, or in default, to pay the actual value of them.

Also, whether the circumstance of defendant's use of appellant's stock for its own purposes, and where appellant would derive no other, or greater, benefit or profit than the other shareholders of the company, and where by such use plaintiff in error lost control of the company, since he no longer held a majority of its stock, did not establish a *prima facie* case entitling him to recover, which the defendant was bound to overthrow by showing affirmatively that no such liability was intended or, in fact, legally incurred.

Also, whether, after having obtained the stock from plaintiff, without giving any consideration therefor, and subsequently using it in acquiring valuable property and franchises, for its sole use and benefit, and in doing so

represented that the stock had been purchased and was owned by defendant, it was not estopped from denying its liability.

Fourth. The finding and judgment of the Court below are contrary to law and to the evidence.

BRIEF.

1st. It is conceded in the pleadings, and throughout the testimony, that plaintiff in error was the absolute owner of 2,230 shares of the capital stock of the defendant corporation, prior to Dec. 19, 1879, and was entitled to have the same issued to him, full paid, at any time on demand.

If, as alleged in defendant's answer, Eldred agreed to relinquish the 250 shares in consideration of his receiving part of the stock then due him, such an agreement was a mere *nudum pactum*.

Harrison *v.* Close *et al*, 2 Johns. 448.
Tittsworth *v.* Hyde *et al.*, 54 Ill. 386.
Stauber *v.* Schack, 83 Ill. 191.
Crawford *v.* Millspaugh, 13 Johns. 87.

2d. The corporation was fully organized Dec. 3, 1879, was for profit, and could thereby incur the indebtedness to plaintiff.

Mor. on Corporations, Sec. 174.
Ward *v.* Johnson, 95 Ill. 238.
Daniel on Negotiable Inst., Vol. I., Sec. 382.

3d. It is no bar to plaintiff's right to recover that he was at the time the obligation of defendant was created an officer and stockholder. His relation to the corporation goes only to the good faith of the transaction.

Merrick *v.* Peru Coal Co., 61 Ill. 472.
Whitewell *v.* Warner, 20 Vt. 425.
Sargent *v.* Webster, 13 Metc. 497.
Angel and Ames Corp., Sec. 233, and cases cited.
Twin Lick Oil Co. *v.* Marbury, 1 Otto. 587.

4th. To constitute a promise binding in law, no form of words is necessary. An implied promise is proved by circumstantial evidence. A party may assume an obligation by putting himself into a position which requires the performance of duties.

Webster *v.* Upton, 1 Otto. 68.
Routsong *v.* Pacific Railroad, 45 Mo. 236.

5th. The stock was used by the defendant for its sole use and benefit; a liability was thereby incurred; an express and formal agreement to pay is not necessary in order for appellant to recover.

T. W. & W. R. R. Co. *v.* Chew, 67 Ill. 378.
2 Greenlief, Ev., Sec. 108 and Note 3.
Routsong *v.* Pacific Railroad, 45 Mo. 236.

6th. After the acceptance of the stock, execution of a deed of consolidation, and issuance of the shares to third persons as a consideration for valuable property and rights thereby acquired, and for the sole use of the defendant, it is estopped from denying its liability therefor.

Wood *et al. v.* Whelen, 93 Ill. 153.
P. & S. R. R. Co. *v.* Thompson, 103 Ill. 202.
Bradey *v.* Ballard, 55 Ill. 413.

7th. Controverted questions of fact must be submitted to the jury, under proper instructions by the Court as to

the law. The questions were all taken from the jury by the Court in its last instruction to the jury (p. 48).

Railroad Co. *v.* Bank, 12 Wall. 227, 231.
Greenlief *v.* Birth, 9 Peters, 292, 299.
Insurance Co. *v.* Rodel, 95 U. S. 233, 238.
Insurance Co. *v.* Doster, 106 U. S. 30, 32.
National Bank *v.* City Bk., 103 U. S. 668.
Manchester *v.* Erricsson, 105 U. S. 347.
Cook v. H. & St. Joe. R. R. Co., 63 Mo. 398.
Tutt *v.* Cloney, 62 Mo. 116.
Holliday *v.* Jones, 59 Mo. 484.
Emerson *v.* Sturgeon, 18 Mo. 170.
Bradford *v.* Rudolph, 45 Mo. 426.
St. Vrain *v.* C. B. L. Co., 56 Mo. 590.

Argument.

It is respectfully and confidently asserted that the justice of the matter herein in controversy is manifestly with plaintiff in error.

He owned the stock in question, advanced it as an accommodation to defendant at the time of an emergency, the same as so much money, to be used solely for its corporate purposes; it was so used, and by the plainest principles of law he should be fully compensated therefor.

The defendant was duly organized and vested with all the powers and privileges incident to a corporation, aggregate, on Dec. 3, 1879. It obtained certain valuable contracts and franchises in full satisfaction for its capital stock, and through its officers, Eldred, Durant and Smith, at once took possession of the property thus acquired, which consisted of the stock of the Kansas City Telephonic Exchange, the

Western Union Exchange at Kansas City, the Gold and Stock Exchange at St. Louis (together with certain licenses and contracts not necessary here to mention), and 263 shares out of 500 of the stock of the American District Telegraph Company at St. Louis, upon which properties an indebtedness to the Western Union Telegraph Company had been incurred, for which the defendant *afterwards* paid $75,000 to discharge.

On Dec. 19, the arrangement for the exchange of stock was completed, Eldred advancing to the defendant $25,000 of stock for that purpose.

A deed of consolidation was executed, the stock was issued to third persons, who were holders of the American District stock, in exchange for their holdings, which amounted to $11,850, and the remainder retained by defendant, who was owner of the 263 shares, as above stated.

It cannot be questioned but that the defendant corporation was invested with all the powers necessary to enable it to incur the indebtedness to appellant for the stock, or to have borrowed the money with which to have purchased the stock, or that such a proceeding was not for the best interests of the defendant. The testimony of the witness Durant, general manager of defendant (p. 34, printed record) is very explicit upon this point. He says: —

"It placed all the business in St. Louis under the control of the Bell Telephone Company of Missouri. There were no more shares of stock than there were before, but there was a very great deal more property than there was before. The American District Telegraph Company plant, as a factor in the property of the Bell Telephone Company of Missouri, was probably equal to all the other interests that were brought into it. The Bell Telephone Company of Missouri

would hardly have undertaken to do business in St. Louis without acquiring the business of the American District Telegraph Company."

In acquiring the property of the American District Company, plaintiff in error was no more interested or benefited than any other stockholder. *By advancing the stock he no longer remained a majority owner of the company.* Can it be said, with any degree of seriousness, that one owning a controlling interest in a corporation, which is recognized universally as a great advantage and pecuniary benefit, would voluntarily, without any present consideration, or expected remuneration in the future, yield up the control? Certainly, it cannot, much less a man of the business experience of Mr. Eldred, who, as he testifies (Record, p. 7), was general manager of the telephone department of the Western Union Telegraph Company of New York.

Let us suppose that in place of a stock arrangement with the stockholders of the American District Company having been consummated, they had agreed to sell out their holdings to the defendant, who was then owner of the majority of the American District Company's stock, at par, but being without money, the defendant could not become the purchaser, and plaintiff had offered to advance the $11,850 necessary to place all the stock and property of the American District Company in the hands of the defendant, which offer defendant accepted and made the purchase. Could it be said that there was no liability on the part of the defendant to repay the loan? Again, in taking the property in exchange for the stock liability, and issuing its shares of stock as full paid therefor, a debt, as we have seen, was incurred of $75,000, the cost of the property obtained by Eldred from the Western Union Telegraph Company, and which included the 263

shares of the American District Stock, which he testified he purchased on Nov. 29, 1879; was there *any difference* between *this liability* and the one created when it *cost him $25,000 more in stock to secure the remaining 237 shares* of the American District Telegraph Company's stock, for the *sole use and benefit of the defendant corporation?*

While the record shows Mr. Eldred to have been a very generous man to those individually with whom he became associated in the organization of the defendant company, to a degree seldom met with, yet it *nowhere appears* that, in his dealings with the company, *he waived any rights, made any concessions or donations.* Every dollar of money advanced to place the company on its feet financially, and to pay the attorney's fees incident to defendant's organization, was *exacted* and *paid*, as the income and financial condition of defendant would admit. His dealings with the defendant throughout were those of a *lenient creditor* and not that of a reckless spendthrift.

The fact must not be overlooked that plaintiff was the recognized owner of a majority of the stock on Dec. 19, after making of the advance of 250 shares he had but a minority interest remaining, or 1,980 shares.

There is *nothing in the record showing that he intended* thus to part with the control of the company, for no other consideration than that his remaining 1,980 shares would be more valuable by the acquisition of property by the corporation for its sole use and benefit, nor is there *anything* showing a *waiver* of his right to require compensation at a subsequent time. The burden of proof upon this point rested with the defendant, but it made no attempt in that direction.

The view entertained by the Court below of this case seems

clearly outlined in its action in refusing to give the requests offered by counsel for plaintiff in error, and in giving the one asked on behalf of defendant, supplemented with oral instructions to the jury that "under the evidence adduced they could do nothing but find for the defendant."

Attention will be called to the first part of the second paragraph of the request given on behalf of defendant (p. 48 of printed record), which is as follows: —

"The question for the jury to determine is simply whether theplaintiff, Eldred, in authorizing such disposition of said 250 shares of stock, relinquished and surrendered the same to the Bell Telephone Company in consideration of the benefit to be derived by himself with other stockholders therein, from the proposed consolidation of the two companies, or whether any agreement was made between said plaintiff, Eldred, and the Bell Telephone Company of Missouri, as a corporation, to the effect that said Eldred should be paid for said stock."

We respectfully submit that the record does not warrant any such instruction. Plaintiff testified that *he advanced the stock to the defendant as he did the money;* after he had been repaid his cash advances he demanded compensation for the stock: this was denied and he brought his suit to recover, which shows, as far as his conduct could, what his intentions were. There is *nothing from which a presumption can be indulged* to overthrow the idea that he expected to be compensated for his stock.

The recital in the minute book (p. 33 of record) that

"In consideration of the agreement of H. H. Eldred to surrender to this company 250 shares of stock so allotted to him for the purpose of effecting a consolidation with the American District Telegraph Company of St. Louis, a certificate of 1,980 shares shall be issued to said Eldred,"

in lieu of the 2,230 then due him, is no consideration what-

ever. It recites that there was an "agreement." If so, what was the consideration? It certainly was not that he was to receive 1,980 shares, when 2,230 were due him. Such an agreement was a mere *nudum pactum*.

Harrison *v.* Close, 2 Johns. 448.
Tittsworth *v.* Hyde, 54 Ill. 386.
Crawford *v.* Millspaugh, 13 Johns. 87.
Stauber *v.* Schack, 83 Ill. 191.

The Court, in the third paragraph of its instruction to the jury, says: —

"That in order to render the defendant corporation liable for said stock it is incumbent upon the plaintiff to prove an agreement by said corporation to account for, or return, or pay for, said stock made by the officers or officer of said corporation authorized to make such an agreement."

Such is not the law. Corporations, like natural persons, may be bound by implied assumpsits. Appellant was dealing with the vice-president and general manager of the defendant in all these matters, who took the stock and subsequently issued it to third persons in furtherance of the interests of the corporation and in compliance with the terms of the deed of consolidation between defendant and the American District Company.

The case of T. W. & W. R. R. Co. *v.* Chew, 67 Ill. 378, was a case where plaintiff brought suit to recover the value of railroad ties, alleged to have been furnished the company, the same having been delivered along the line of road, taken possession of and used by the company without a formal purchase. We quote the following from the opinion of the Court: —

"Was the company liable for the ties thus used? They were wholly converted to the use of the company, became a

part of its road, could not readily be separated therefrom. Some of them were imbedded in the earth and the iron spiked upon them, and others were split up and driven under the ties imbedded. There could be no more complete conversion and appropriation of the property of the plaintiff. They were not taken to be converted into money, but for the construction and repair of the road, and were effectually converted into money's worth. They were delivered to be used upon the road, and were thus used; and though the taking may have been, to some extent, tortious, the plaintiff might waive the tort and recover *in indebitatus* assumpsit, as the company had applied the ties to its own benefit."

In the case of Wood *et al.* *v.* Whelen, 93 Ill. 153, where the promoters of a corporation, acting as the *de facto* organization not yet incorporated, adopted a resolution that for the purpose of completing and putting in successful operation the works for which the corporation was to be organized to control, there should be issued a certain number of bonds of the company to be secured by mortgage upon its property, which bonds and mortgage were executed by the officers of the company, and on May 27, 1872, after the organization of the company, its board of directors, by resolution, gave express authority to their agent to sell the bonds and deliver the mortgage as security therefor. The Court said: —

"It is undeniably the law that all business relating to the legitimate objects of a corporation, authorized by its charter, may be transacted by the directors without the sanction of the stockholders. As borrowing money for the purpose of forwarding the objects of the corporation is among the ordinary duties of the board of directors, it follows that the board may secure the same by deed or other lien. It is a part of the business transactions of the corporation, which has always been regarded as within the province of the directors to perform. . . . That which was done on the 27th of May, 1872, was equivalent to original authority to issue the bonds and the adoptions of the mortgage previously executed as security

for the same, and as these were acts the directors might perform by virtue of the implied powers existing in the corporation necessary to its existence, as well as powers given by express statute, it is a valid execution of powers. But it is said the action of the board of the 27th of May is at most an indirect ratification of the bonds, but not of the lien of the holders thereof, which the mortgage gave. It is not accurate to say the action of the board of directors of that date was nothing more than a ratification of either of the bonds or mortgages. As we have seen, it was original authority for issuing the bonds for the purpose of borrowing money, for the use of the company in the business it had undertaken, and for delivery of the mortgage as security to the holders, as well as a ratification of the action of the promoters of the corporation previously had.

"The objection implied in the inquiry, If no seal was attached to the mortgage, would the resolutions of the directors of May 27, 1872, have attached the corporation seal of the company to it, or authorized any one to do it, is hypothecated. It is not claimed that it would. But the seal being already attached to the instrument executed and still in their possession, the directors could adopt it without resealing it as a new act. It was attached, and to reattach the seal before delivering the mortgage would be an idle ceremony. The delivering of the mortgage and bonds by authority given by the resolution of the directors at the time of the sale to the holders, sealed with the corporate seal of the company and with the signatures of the officers attached, has all the binding force in law as if the seal and the signature of the officers had been placed there again after the adoption of the resolution. It would be so in the case of natural persons, and private corporations are subject to the same liabilities in the transaction of business. Authorities, sustaining at some degree the views we have expressed on this branch of the case, are Miller *v.* R. and W. R. R., 36 Ves. 452; Meeker *v.* C. and P. H. R. R., 2 La. Ann. 972.

"The money obtained on the bonds was to be and was used for the objects of the corporation, as declared in its charter. It was for the promotion of the objects for which the corporation was created, and if no express authority had been given to obtain the money and secure it on the prop-

erty of the corporation by mortgage, or otherwise, it would be within its implied or incidental powers, and the *corporation would, on the plainest principles of natural justice, be estopped to deny that it had authority to pledge its property, real or personal, or both, for the repayment of the money.*"

In the case before the Court, defendant formally accepted the assignment of the stock at a meeting of the stockholders on Dec. 19, 1879, for its corporate purposes (printed record, pp. 32 and 33), and, on the day following, formally entered into an indenture of consolidation, whereby it covenanted that it had "*purchased and is now owner of 250 shares of its capital stock*," which it tendered in exchange for the stock of the American District Company, which was duly and formally accepted therein, thus ratifying any possible informality, which might have previously existed, as to the manner in which the stock had been purchased, and at the same time disposed of the stock for the identical purpose for which the stock had been acquired, and for its sole corporate use and benefit.

The case of Merrick *v.* Peru Coal Co., 61 Ill. 472, was in many respects similar to the one at bar. Plaintiff and his brother Charles, before becoming the purchasers of the stock of the Peru Coal Company, anticipating that the corporation would need both money and credit to develop and carry on the enterprise, agreed between themselves that they would equalize the advances thus to be made. Plaintiff subsequently was elected president of the coal company, and in that capacity issued notes for the company's indebtedness to third parties for large amounts; these he took up with his own private means when they came due; he also advanced moneys for corporate purposes and performed services, for which he produced vouchers, increasing his demands against

the company to $30,580.84. On the trial of the case the defence presented the question,

"Whether the payments were made and the labor performed on the credit of this company, and for which it became liable, or whether they were made in pursuance of the original agreement between him and his brother for the purchase and operation of the property of the company?"

Mr. Justice Walker, in delivering the opinion of the Court, said: —

"Here is a corporate body, having a legal existence, endowed with ample powers to enter into contracts and agreements of suing and being sued, which has given notes and drafts which were undeniably binding on it in law, — such instruments as the payees and drawees could, beyond all doubt, have sued upon and recovered after their maturity. So could their assignees. And it may be asked why appellant could not recover, when he, in his own individual right, with private means, purchased these instruments, so far as we can see, in good faith, or, at all events, paid with his individual funds, for the use and benefit of the company. It will not be said that he could not recover because he was a stockholder and officer of the company, as both have the right to deal with the company in the same manner as strangers may; and when they do so, each party acquires the same rights and incurs the same liability as would strangers.

"There is no rule of law which prohibits a shareholder from dealing with the company, or from suing or being sued by it. It then follows that appellant, notwithstanding he was the president of the company, had the right, with his own funds, to purchase these notes and drafts, and when he did so he succeeded to all the rights of the holders. Or he, *upon taking up, with his own means, such indebtedness, had the right to maintain an action for money paid, laid out and expended for the use of appellee.*

"*It is equally true, that, if he advanced money to the company to enable it to carry on its business, he can sue it and recover for money loaned. Having the right to deal with the*

company, he had the power to loan it money and to look to it for payment. Such is the well-recognized law, and it must control unless prevented by the agreement of C. C. Merrick and appellant, entered into when they first purchased the property.

"Whatever may be the rights of these parties, as individuals or as partners, in forming the company as they did, we are wholly unable to see that appellee can invoke the private agreement of the Merricks to release it from liabilities it has legally incurred and never discharged. The company was not a party to that agreement, and has no more concern with it than if it had been entered into by persons who neither held stock in nor were officers of the company.

"We can alone look to the liabilities of the company, and not to the equities that may exist between appellant and his brother. The corporation, according to the usual course of business, incurred the liability to pay this indebtedness, and has done no act to discharge it from that burden.

"It has no right to insist upon the performance of an agreement entered into by two of the shareholders in reference to the terms and conditions that they should purchase and hold stock and loan money to the company. That was their private affair, which in no wise concerned the company.

"We must not forget that the company is a separate legal entity existing independently of the Merricks, although they may have owned much the greater portion of the stock.

"It is urged that appellant repeatedly said that the company owed him nothing, or that it owed nothing. From the whole of the evidence in the case, we are of the opinion that these declarations were all made when he supposed that he was compelled to look to his brother for the sum he had advanced in excess of that contributed by him, and under the supposition that he had no power to recover from the company. It is not pretended that he ever admitted that the money advanced by him to the company had been paid to him. It is manifest that he made this statement and admissions in ignorance of his legal rights, and from the evidence, we see nothing that should be held to conclude him from asserting them in this suit."

The case of Bradly *v.* Ballard, 55 Ill. 413, was a bill in

chancery filed by Bradly against Ballard and others, for the purpose of enjoining the collection of certain promissory notes, given by the corporation of which complainant was a stockholder.

Mr. Chief Justice Lawrence, in delivering the opinion of the Court, said: —

"While courts are inclined to maintain with vigor the limitations of corporate actions, where it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires, of which they have received the benefits. This is demanded by the plainest principles of justice.* 2 Kent, 11 Ed., p. 381, note: Zabriskie *v.* C. C. & C. R. R. Co., 23 How. U. S. 381; Bissell *v.* M. S. & N. I. R. R. Co., 22 N. Y. 258; Cary *v.* C. & T. R. R. Co., 29 Barb. 35; Parish *v.* Wheeler, 22 N. Y. 494; Groff *v.* A. L. T. Co., 21 N. Y. 124; Argenti *v.* San Francisco, 16 Cal. 255; McCluer *v.* Manchester & L. R., 13 Gray, 124; Chapman *v.* M. R. & L. R. R. Co., 6 Ohio, 137; Hall *v.* Mut. Fire Ins. Co., 32 N. H. 297; Railroad Co. *v.* Howard, 7 Wallace, 413.

"The borrowing of money was not in itself an act *ultra vires*, nor was the giving of notes. The money was not borrowed to be used for any illegal or immoral purpose. The lenders have been guilty of no violation of law, nor wrong of any kind. The corporation has received the money and used it for a purpose, which whether *ultra vires* or not was unquestionably the sole purpose for which the corporators associated themselves together, and for which complainant became a stockholder. Justice requires the corporation to repay the money it has thus borrowed and expended.

"If to increase their profits, they embarked in enterprises not authorized by their charter, still, as to third persons *and when necessary for the advancement of justice, the stockholders will be presumed to have assented*, since it is in their power to restrain them when they transgress the limits of their chartered authority."

II.

The constitutional right of trial by jury has not been formally taken away, although plaintiff in error respectfully submits that this was practically done by the court below.

Feeling this, as he does, very keenly, he desires this honorable Court to carefully consider the third assignment of errors; that what he feels to be a great wrong to him may be righted, if the views of the law entertained by him are correct.

What is a question of fact? This court answers this question so far as is important upon the main point in this case very concisely in Railroad Co. *v.* Bank of Ashland, 12 Wallace, 227, 231, where it is stated that: —

"Surely, the question whether the negotiation of bonds was a sale or a loan is ordinarily and *prima facie* a question of fact. To make it a question of law, some fact must be admitted or proved which is irreconcilable with one conclusion or the other."

There is no fact admitted, or proved, in the case at bar, to make it a question of law under the rule thus laid down by this court. The advancing of the stock by plaintiff to defendant was a *sale* or a *loan*. No fact is "admitted or proved which is irreconcilable with one conclusion or the other." It is as clearly and purely a question of fact as was ever presented in a court of justice.

In Greenlief *v.* Birth, 9 Peters, 292, 299, this court says: —

"The counsel for the plaintiff further prayed the Court to instruct the jury that the evidence was not sufficient to prove that the contract between Morris, Nicholson & Greenlief, on the one part, and Stewart, on the other, had been annulled or rescinded between the parties at any time prior to the

execution of the deed by the plaintiff and Morris and Nicholson, in May, 1876.' If this instruction be considered as asking the Court to determine on the effect of the evidence, it was properly refused. It is the province of the jury to weigh and decide on the sufficiency of the evidence, and from the words of the instruction it would seem to be conceded that there was some evidence of the rescission of the contract, as the Court were asked to instruct the jury that the evidence was not sufficient to prove the fact.

"Where there is no evidence tending to prove a particular fact, the Court are bound to so instruct the jury when so requested, but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence, and determining what effect it shall have. In this view the Circuit Court did not err in refusing the above instruction."

Brief extract from other decisions of this Court are given below in harmony with the foregoing: —

"It is hardly necessary to say, that, if there was any evidence tending to prove that the deceased was insane when he took the poison which caused his death, the *judge* was not bound to and *indeed could not properly take the evidence from the jury*. The weight of the evidence is for them and not the judge to pass upon."

Insurance Co. *v.* Rodel, 95 U. S. 233, 238.

"When a case fairly depends upon the *effect* or *weight* of testimony, it is one one for the consideration of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them unless the testimony be of such a *conclusive character* as to *compel* the Court, in the exercise of a sound judicial discretion, to set aside a verdict in opposition to it."

Insurance Co. *v.* Doster, 106 U. S. 30, 32.

The same rule is applied in

National Bk. *v.* City Bk., 103 U. S. 668.
Manchester *v.* Errieson, 105 U. S. 347.

Sect. 914 of the U. S. Judiciary Act is as follows:—

"The practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes, shall conform as near as may be to the practice, pleadings and forms and modes of procedure existing at the time in like causes in the courts of record of the State, within which such circuit of district courts are held, any rule of court to contrary notwithstanding."

The rule of practice in the State of Missouri, where this case was tried, is set forth in Gregory *v.* Chambers, 78 Mo. p. 298. The Court says:

"*No rule of law is more firmly grounded in the practice of this State* than that the *jury is the sole judge* of the weight of evidence and the credibility of the witnesses. *Upon this part of their province no judge is permitted to go.*"

In Kelly *v.* H. & St. Joe. R. R Co. 70 Mo. 607, the Court defines the province of a jury in the following language:—

"When the facts are disputed or the credibility of witnesses is drawn in question, or a material fact is left in doubt, or there *are inferences to be drawn from facts proven*, the case, under proper instructions, *should be submitted to the jury. It is for the jury and not the Court* to pass on the weight of evidence where there is *any evidence*."

To the same effect is

Cook *v.* H. St. Joe. R. R. Co., 63 Mo. 398.
Tutt *v.* Cloney, 62 Mo. 116.
Holliday *v.* Jones, 59 Mo. 484.
Emerson *v.* Sturgeon, 18 Mo. 170.
Bradford *v.* Rudolph, 45 Mo. 426.
St. Vrain *v.* C. B. L. Co., 56 Mo. 590.

The Supreme Court, in Routsong *v.* Pacific Railroad, 45 Mo. 236, applied this rule of practice in a case which pos-

sessed none of the strong points of the case at bar, although based upon an implied contract.

Wagoner, Justice, delivered the opinion of the court: —

"Plaintiff commenced his action, claiming a balance of $451.50, on account of a lot of cord wood contracted for, sold and delivered by him to the defendant. The answer denies all the material averments of the petition.

"The case was tried before a jury, and the plaintiff had a verdict and judgment in the Circuit Court, which judgment the District Court affirmed.

"It is contended that there was an entire want of evidence to support the verdict. Upon an examination of the record, I cannot say that there was no evidence conducing to prove the issue tendered by the plaintiff. From the fact that the plaintiff's wood was placed alongside of the road with his name upon it, and that defendant's agent measured the wood and the road used it, the jury might have inferred or deduced a contract. *It was not necessary to prove an express contract. It might be implied from facts and circumstances.* It is true there was evidence tending to show that the wood was furnished to another party, from whom the road purchased. But it was, at least, a question of fact for the jury to determine, *and not within the province of the Court to decide.*"

The requests presented on behalf of plaintiff in error, and rejected by the court below, we believe embraced the law appliable to the facts of this case, and should not have been rejected. This assertion, it is believed, has been conclusively shown to be true in the foregoing argument and upon the authorities cited.

We are aware of the fact that this court does not, as cases are ordinarily presented, review the evidence for the purpose of passing upon the merits of the controversy.

But where the trial court has taken a case from the jury by instructing them "that under the evidence adduced they

could do nothing but find for the defendant," and this action has been assigned as error, and where the merits of the case are substantially presented by the pleadings so that it becomes in part a question of law, and not alone one of fact, whether, under the facts and circumstances surrounding plaintiff's transactions with defendant he is entitled to recover.

We are not aware of this court refusing to examine the record sufficiently to be advised of the grounds upon which plaintiff rests his claim, and therefore ask such examination, being most profoundly convinced that the real merits are with our client, and that such will be the decision of the Court after such inspection has been made.

We therefore ask that the judgment of the court below be reversed and the cause remanded with instructions to the Circuit Court to set aside the verdict and grant a new trial.

Respectfully submitted,

MILLARD R. POWERS,
L. B. VALLIANT,
Attorneys for Plaintiff in Error.

119-513

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

HORACE H. ELDRED,
Plaintiff in Error,

vs.

THE BELL TELEPHONE COMPANY OF MISSOURI,
Defendant in Error.

No. 84.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

HENRY HITCHCOCK,
Of Counsel for Defendant in Error.

Nixon-Jones Printing Co., Law Printers, 210 and 212 Pine Street, St. Louis.

that plaintiff is a citizen of the State of New York and the defendant a corporation organized under the laws of Missouri and a citizen of said State, it states the cause of action in the following words:[1]—

And the said plaintiff further states that heretofore, to-wit, on the 19th day of December, 1879, at the special instance and request of the defendant, he advanced, furnished, and delivered to the defendant, to be by the defendant accounted for to the plaintiff, two hundred and fifty shares of the capital stock in said defendant corporation, of the par value of one hundred dollars per share, of the personal property of the plaintiff, and which was then worth one hundred dollars per share, and twenty-five thousand dollars for the whole two hundred and fifty shares, and which the defendant then received from the plaintiff and afterwards appropriated to its own use, with the understanding that the defendant would pay the plaintiff for the same what it was worth, by means of which the defendant became liable to pay to the plaintiff said sum of twenty-five thousand dollars; yet the defendant has never paid the plaintiff said sum of money or any part thereof, but refuses so to do.

Thereupon judgment is asked for $25,000 and interest and costs.

The answer of defendant, after specifically denying each allegation in the petition, sets up an affirmative defense as follows:[2]—

Defendant further states the fact to be that on or about December 19th, 1879, said plaintiff, who had previously become entitled to receive from this defendant as one of the original corporators thereof a total of 2,230 shares of said stock, did himself expressly agree to relinquish and and did relinquish and surrender to this defendant his right to receive from said defendant 250 shares of said stock; that said agreement was voluntarily made by plaintiff at his

[1] Printed Record, p. 3.
[2] Rec. p. 4.

own instance and in consideration of certain benefits to him, said plaintiff, as a stockholder in said company, which were expected to accrue to him from such surrender of said 250 shares of stock to said corporation, by enabling said defendant corporation therewith to acquire from third parties for the benefit of all the stockholders in the defendant corporation, including said plaintiff, certain valuable rights and property for the prosecution of its business and purposes; that for said expected benefits and consideration, the plaintiff did not, as alleged, advance and furnish to the defendant corporation, but did expressly surrender to said corporation his right to receive from it said 250 shares of stock, and did then and there accept from this defendant, in full satisfaction of all right and claim on the part of him, said plaintiff, against this defendant, for capital stock thereof (1980) nineteen hundred and eighty shares of the said capital stock of said defendant corporation, for which 1980 shares a certificate was then and there by defendant, through its authorized agents, made out, issued, and delivered to plaintiff, and was by him accepted in full of all the shares of said stock to which he remained and was entitled; that afterwards, and with the knowledge and consent of plaintiff, who was at the time president of the defendant corporation, the said 250 shares of said stock therein so surrendered and relinquished by him, for the consideration aforesaid, were issued for value to other parties by this defendant, and thereby the benefits and consideration for which plaintiff had so relinquished and surrendered his right to the same were in fact secured and received, and said agreement of plaintiff on the faith of which this defendant did so issue to third parties said stock so previously surrendered by plaintiff, was thereby executed; and defendant says that by reason of the premises, plaintiff was and is estopped from setting up or asserting against this defendant or against any other person, any claim or demand for or in respect of said 250 shares of stock so relinquished and surrendered by him, or for the value or proceeds thereof or any part of the same.

And defendant avers that the transaction last herein set forth was the same transaction referred to by plaintiff in his petition in this behalf and none other, and except in the manner and for the considerations above stated by defendant, it is not true that in December, 1879, plaintiff fur-

nished or delivered to defendant, or that defendant received in any manner from plaintiff, 250 shares of said stock in said defendant corporation.

Plaintiff's reply to the new matter in defendant's answer was as follows:[1] —

Again comes the plaintiff, and for reply to defendant's answer, says true it is that at the time plaintiff delivered to defendant said 250 shares of stock, it was contemplated between both parties to said contract, that the defendant would use said stock in the purchase or exchange from third parties of certain valuable rights and property; but plaintiff avers that said rights and property were to be acquired by the defendant in its own name and for its own and sole use, and with no peculiar benefit to the plaintiff which would not in equal proportion be shared by all the stockholders.

And true it is said rights and property were purchased from said third parties, but plaintiff avers they were purchased in defendant's own name, and defendant has had and enjoyed the full and sole use and benefit of the same, and the price paid for the same was the said 250 shares of stock advanced and delivered by plaintiff to defendant.

But plaintiff denies each and every other allegation of defendant's answer, and prays judgment as in the petition.

The cause was tried before a jury on October 10, 1882.

The only witness who testified for plaintiff was the plaintiff himself, who also proved and put in evidence certain letters relating to the formation of the defendant corporation, and to the terms upon which it was to acquire certain rights under the telephone patents owned by the National Bell Telephone Company; also a copy from the minute book of the defendant corporation of an agreement, under

[1] Rec. p. 5.

date of December 20, 1879, between the defendant corporation and the American District Telegraph Company of St. Louis, for the consolidation of said corporations, on terms of exchanging the stock in the latter company for stock in the former, at the rate of one share of the former for two shares of the latter.[1]

Three witnesses testified for defendant, namely, George F. Durant, its General Manager, F. N. Judson, one of its attorneys, and E. A. Smith, its Secretary; besides which were put in evidence certain proceedings of the stockholders of the defendant corporation, as shown by extracts from its minutes; also the original certificates of stock issued by the defendant corporation to the plaintiff and others.[2]

At the close of the testimony the plaintiff prayed the court to give certain instructions to the jury, all of which were refused.[3]

At the defendant's request one instruction was given by the court to the jury, hereinafter set forth.[4]

The court then orally instructed the jury that under the evidence adduced they could do nothing but find for the defendant; and thereupon the jury, without retiring, rendered a verdict for the defendant.[5]

To the action of the court in refusing and granting instructions as aforesaid the plaintiff at the time excepted; also to the ruling of the court in excluding certain testimony offered for plaintiff, and admitting certain testimony offered for the defendants, as hereinafter mentioned.

The plaintiff in due time filed his motion to set aside the verdict and for a new trial, upon the usual grounds; which motion being overruled on October 30, 1882, the plaintiff's

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[1] Rec. pp. 7-27.
[2] Rec. pp. 28-47.
[3] Rec. pp. 47-8.
[4] Rec. p. 48.
[5] Rec. pp. 48-9.

bill of exceptions was allowed and signed on November 4, 1882.[1]

On November 10, 1882, plaintiff sued out a writ of error from this court and service of citation was acknowledged for defendant on the same day;[2] and so the cause comes to this court.

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[1] Rec. p. 49.
[2] Rec. p. 1.

THE QUESTIONS INVOLVED.

The questions presented by this record relate to —

1. The ruling of the Circuit Court at the trial in excluding evidence offered by plaintiff and admitting evidence offered by defendant, against plaintiff's objection:

2. The refusal by the Circuit Court to grant certain instructions asked for plaintiff:[1]

3. The granting by the Circuit Court of an instruction asked by defendant:

4. The Circuit Court, of its own motion orally instructed the jury that under the evidence adduced they could do nothing but find for the defendant:[2]

To all which rulings plaintiff excepted at the time.

Rulings on Evidence.

Defendant's objections to certain testimony offered or questions asked on behalf of the plaintiff were sustained by the court, the plaintiff excepting thereto, as follows: —

1. Plaintiff was asked, to whom, in the fall of 1879, the title passed to the "Gold and Stock Exchange" at St. Louis, and the "Western Union Exchange" at Kansas City, Missouri. Defendant objected to oral testimony on that subject, claiming that the evidence should be in writing; which objection was sustained, and exception taken.[3]

2. Plaintiff having stated that on November 29, 1879, by

[1] Rec. pp. 47-8.
[2] Rec. p. 48.
[3] Rec. p. 8.

arrangement with the Western Union Telegraph Company, he became practically the owners of the franchises of the two telephone exchanges above mentioned, was then asked by his counsel,—

Q. What were the terms of the purchase by you?
(Defendant's Counsel): What purchase?
(Plaintiff's Counsel): Of these exchanges; he says that they became his property.
Defendant objects as irrelevant; objection sustained; exception taken.[1]

3. Plaintiff testified[2] that after acquiring certain telephone rights he came to St. Louis early in December, 1879, and organized the Bell Telephone Company of Missouri with a capital stock of $400,000; but soon afterwards organized "the present company," — the defendant corporation, of the same name — for the consolidation of the American District Telegraph Company with "the original Bell Telephone Co.;" that 4,000 shares of stock of "the original Bell Telephone Company" were issued, 2,230 to plaintiff himself, and the remainder to three other parties, to whom it was a gift. Plaintiff was asked — the context showing that the question related to "the original Bell Telephone Company" —

Q. Did you invest any money or advance any money at the organization of this company?
Defendant objects as immaterial; objection sustained and exception taken.

4. During the cross-examination of the plaintiff, Eldred, the following ruling was made:[3]

Q. Did you state that 2,230 shares of full paid stock of the first Bell Telephone Company of Missouri was issued to you?
A. I am not positive, but I think there was.

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[1] Rec. p. 8.
[2] Rec. pp. 8, 9.
[3] Rec. p. 21.

Q. Perhaps I can refresh your memory. Do you recollect about the issue of the first certificate of stock? A. I think you have them in your hand, sir.

Q. See if these are the original certificates?

(Paper shown witness.)

Plaintiff objects as irrelevant; objection overruled, exception taken.

Q. Do you recognize either of those certificates as issued to you? A. Yes, sir.

Q. How many? A. 1,980.

Q. Did you receive any other certificates of stock but that from the company? A. Not that I remember.

Q. At what date was that issued? A. The 19th day of December.

Q. That is the same day, is it not, that you claim in your petition you advanced 250 shares of stock? A. I believe that is the same; these certificates of stock were all issued to me on the same day, or within a few hours of each other.

5. At the close of the cross-examination defendant's counsel referred to a statement volunteered by the witness, concerning subscriptions to stock of the Western Union Telegraph Company,— saying that if the court considered that statement relevant to the issues, he would ask the witness further questions, otherwise not. The court replied that the statement referred to "does not bear upon the case; "it was a volunteer remark and may be stricken out." [1] Upon this the cross-examination closed. To this ruling the plaintiff excepted.

It does not appear that any such statement by the witness was preserved in the bill of exceptions.

6. On re-examination of the plaintiff, by his counsel, the following questions were put and ruling made: [2] —

Q. You say that at a subsequent time, some months afterwards, you had some conversation in reference to this 250 shares of stock on the occasion of fixing up matters with the Western Union Telegraph Company? A. Yes, sir.

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[1] Rec. p. 24.

[2] Rec. p. 25.

Q. State whether such conversation was had between you and a stockholder or stockholders of the Bell Telephone Company of Missouri?

Defendant objects as incompetent; objection sustained and exception taken.

The foregoing were all the rulings of the court, excluding evidence for plaintiff, to which exception was taken.

Objections on the part of the plaintiff to testimony offered or questions asked by defendant were overruled as follows: —

1. G. F. Durant, General Manager of the defendant corporation, testifying for defendant, identified a paper consisting of three sheets, as having been prepared at the office of Overall & Judson, attorneys for the defendant corporation, in connection with the consolidation of the original Bell Telephone Company with the American District Telegraph Company; and that said papers were prepared as part of the minutes of a proposed meeting of stockholders of the original Bell Telephone Company, and were examined by the plaintiff, Eldred, at the time. The witness' attention being called to certain interlineations appearing on said three sheets, the following further questions were asked: [1] —

Q. In whose possession have these papers been since that time? A. In the possession of myself and Mr. Smith, the Secretary of the company.

Q. Can you state how what is written on these papers, as including the interlineation, on the intermediate page in pencil, compare with the minutes of the company as written out?

Plaintiff objects as incompetent; objection overruled; exception taken.

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[1] Rec. p. 29.

A. The minutes were written from that draft. My impression is that I have compared all of them.

2. The plaintiff having testified in chief that about October 14, 1881, he demanded of the defendant the return of the 250 shares stock in question or payment to him of its value, defendant's counsel asked the following question of the witness Durant: [1] —

Q. When did the company or its officers first hear from Mr. Eldred as to any claim like this?

Plaintiff objects as incompetent; objection overruled; exception taken.

A. Some time last October — 1881.

The foregoing were all the rulings of the Circuit Court at the trial, in respect of the exclusion or admission of testimony, to which exception was taken by the plaintiff.

Plaintiff's Instructions Refused.

At the close of the testimony the plaintiff asked the court to instruct the jury as follows: [2] —

If the jury find for the plaintiff they must assess his damages at what they believe from the evidence was the value of the stock at the time it was delivered to defendant, to which they may add interest at the rate of six per cent per annum from such date as they may find from the evidence a demand was made for payment of the claim by plaintiff on defendant.

The jury are instructed that an agreement to accept less than was due is absolutely void, and if the jury believe from the evidence that the plaintiff was entitled to receive from defendant company 2,230 shares of its stock, and agreed to relinquish to the defendant all claim to 250 of such shares in consideration of his receiving 1,980 shares, that such a contract is absolutely void and such agreement

[1] Rec. p. 31.

[2] Rec. pp. 47-48.

will not preclude the plaintiff from recovering the value of said stock.

The court instructs the jury that it is competent for a stockholder to make a contract with the corporation in which he holds stock, and that the fact that the plaintiff was a stockholder in the defendant corporation does not change the rules of law, that as between him and the corporation a consideration is necessary to support the contract, and the fact that the plaintiff's stock might be exchanged in value or otherwise affected as all other stock in the corporation would be exchanged or affected, and with no peculiar advantage to the plaintiff not equally shared by all the stockholders does not constitute a sufficient consideration to support a contract between plaintiff and defendant.

In order to support a contract of the character stated in the petition it is not necessary in order to entitle the plaintiff to recover that an express contract or agreement to pay was made but it is sufficient if the jury believe from all the circumstances of the case that such was the understanding between the parties at the time of the transaction.

If the jury believe from the evidence that the plaintiff delivered to the defendant the 250 shares of stock in question, to be by the defendant used for its own benefit, and that nothing was said between them on subject of payment for the stock, the law will presume that it was so delivered with the understanding that defendant was to pay plaintiff what it was worth, and this presumption will prevail until it shall appear from the evidence that it was understood between the parties that the transaction was a gift.

The jury are instructed that a contract must have as one of its essential elements a consideration, and if the jury believe from the evidence that the plaintiff advanced to the defendant the stock mentioned in the petition to be used by the defendant for defendant's benefit, and that defendant received and used the same for its benefit, they are instructed that the law implies a promise on the part of the defendant to pay the plaintiff what the market value of such stock was at the time of such delivery and acceptance.

All said instructions were refused by the court; to which the plaintiff at the time excepted.

Instructions given.

At the request of the defendant the court gave to the jury the following instruction: [1] —

The fact is not disputed that about the 19th of December, 1879, plaintiff, Eldred, consented to and authorized the issue by the Bell Telephone Company of Missouri to other persons previously stockholders in the American District Telegraph Company of 250 shares of stock in the defendant corporation, one share for two in lieu of stock previously held by such persons in said District Telegraph Company; nor is it disputed that such 250 shares of stock was so issued to such third persons, and that in consideration thereof the plant, property and franchises of the American District Telegraph Company came into the possession of the Bell Telephone Company by the consolidation of said two corporations.

The question for the jury to determine is simply whether the plaintiff, Eldred, in authorizing such disposition of said 250 shares of stock, relinquished and surrendered the same to said Bell Telephone Company in consideration of the benefit to be derived by himself with other stockholders therein from the proposed consolidation of the two companies, or whether any agreement was made between said plaintiff, Eldred, and the Bell Telephone Company of Missouri, as a corporation, to the effect that said Eldred should be paid for said stock.

The jury are instructed that the burden of proving that any such agreement was made rests upon the plaintiff; also, that in order to render the defendant corporation liable for said stock it is incumbent upon the plaintiff to prove an agreement by said corporation to account for or return or pay for said stock made by the officers or officer of said corporation authorized as such to make such an agreement.

And the jury are further instructed that no evidence has been offered by the plaintiff to the effect that any officer of the defendant corporation was authorized to make or did make with said plaintiff any such agreement as above mentioned.

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[1] Rec. p. 48.

To which action of the court the plaintiff then and there excepted.

The court then of its own motion orally instructed the jury, that under the evidence adduced they could do nothing but find for the defendant; to which instruction the plaintiff also excepted.

Thereupon the jury, without retiring, rendered a verdict for the defendant, and judgment was entered accordingly.

ABSTRACT OF THE TESTIMONY.

It is submitted, on behalf of the defendant in error, that the following is a fair summary, or statement, of the result of the testimony on both sides in this cause: —

In October, 1879, the plaintiff, Eldred, was general manager of the telephone department of the Western Union Telegraph Company, of New York.[1] The National Bell Telephone Company (since known as the American Bell Telephone Company), of Boston, then owned certain patents under which "Telephone Exchanges" had been and were being organized in different parts of the country, under contracts or licenses for the use of telephones. Among such subordinate or local companies which had acquired such rights prior to November, 1879, were the Kansas City Telephonic Exchange, and the Western Union Telephonic Exchange, both at Kansas City, Missouri, and the Gold & Stock Exchange and the American District Telegraph Company, both at St. Louis, Missouri. Nearly all the stock of the Kansas City Telephonic Exchange stood in the name of Eldred, but in trust for the Western Union Telegraph Company, and a majority of the entire stock of the American District Telegraph Company, which consisted of 500 shares of the par value of $50 per share, was also owned by the Western Union Telegraph Company.

In October, 1879, plaintiff had some correspondence with the National Bell Telephone Company, of Boston, through Mr. Vail, its general manager, with reference to acquiring the right to operate telephonic exchanges in Kansas City and St. Louis; which resulted in a proposition to Eldred,

[1] Rec. p. 7.

contained in two letters, both dated November 29, 1879,[1] from Vail to Eldred, stating the terms upon which the National Bell Telephone Company would make a new contract for telephonic exchanges at St. Louis and Kansas City. One of the conditions was that Eldred should enter the service of the National Bell Telephone Company at a salary of $3,000 per annum; but this was subsequently waived. The other conditions, as stated in a letter of November 29, 1879, from Vail to Eldred,[2] were as follows: —

St. Louis: Contract to be made for district or exchange purposes to expire at the same date with the present agreement between our company and the Kansas City Telephonic Exchange; the form, our new standard, and the rates to be the regular rental less a discount of 50 per cent until March, 1881; after that regular rental without discount until the expiration of contract. *The present contract between this company and the American District Telegraph Co., of St. Louis, to be surrendered.*

"Kansas City: Present agreement between this company and the Kansas City Telephonic Exchange to be surrendered; a new arrangement to be made covering same period; form to be our new standard; rates to be the same as in present agreement;

"The regular rental at present is ten dollars per annum for each telephone, this company reserving the right to change it at its option, but the rate fixed to apply alike to all licenses.

"At the expiration of these agreements this company will give the Bell Telephone Company of Missouri preference over other parties in any arrangement it may desire to make for the extension of these licenses."

It appears from a letter of November 29, 1879, from the National Bell Telephone Company (W. H. Forbes, President), to the Western Union Telegraph Co., which was also put in evidence by the plaintiff, that the Western Union Telegraph Company had made a contract with the National

[1] Rec. pp. 11, 12.
[2] Rec. p. 12.

Bell Telephone Company to transfer to the latter all the interest of the former in the companies operating the telephonic exchanges at Kansas City and St. Louis, above mentioned.[1]

At the same time that this correspondence was had by Eldred with the National Bell Telephone Company, he made an arrangement with the Western Union Telegraph Company by which was transferred to him, in accordance with the letter from Mr. Forbes above mentioned, the interest of that company in the Gold and Stock Exchange, of St. Louis, and the Kansas City Telephonic Exchange. But it was still necessary for him, in order to fulfill the conditions imposed by the National Bell Telephone Company (in Mr. Vail's letter to Eldred of Nov. 29, 1879),[2] to acquire control of the American District Telegraph Company, in order to surrender the existing contract between it and the National Bell Telephone Company.

Armed with these agreements and concessions Mr. Eldred proceeded to St. Louis, and on December 3, 1879, organized, under the laws of that State, the Bell Telephone Company of Missouri, the nominal capital stock of said corporation being fixed at $400,000, divided into 4,000 shares of $100 each. The plan was to issue these 4,000 shares of stock as full paid, to Mr. Eldred or persons named by him, in consideration of the transfer to said corporation of the rights acquired by him from — or rather, promised to him by — the National Bell Telephone Company, in Mr. Vail's letter of Nov. 29, 1879, upon the conditions therein mentioned. In order to form this corporation, however, it was necessary, under the laws of Missouri, that there should be five stockholders.[3] Accordingly, Mr. Eldred selected four personal friends of his, Messrs. Kent and Storke, of New York, and Durant and Smith, of St. Louis, as his associates for that purpose, and agreed to give them certain propor-

[1] Rec. p. 25.
[2] Rec. p. 12.
[3] Rec. p. 17.

tions of his interest in the rights conceded or promised to him by the National Bell Telephone Company, as follows: Storke 750-4000ths, Kent 250-4000ths, Smith 20-4000ths, and Durant 750-4000ths; Eldred himself to retain the remaining 2,230-4000ths.[1] No money was paid by any of these five corporators, or intended stockholders, for these interests, nor was either of them called upon to pay, nor ever did pay,[1] to the Bell Telephone Company of Missouri, any money for any of the stock of said company which was issued to them.[2] All their stock was intended to be, and afterwards in fact was, issued as full paid stock to said several parties, in the proportions finally agreed on between them; the consideration which the Bell Telephone Company of Missouri was to receive for said 4,000 shares of stock, of the nominal or par value of $400,000, to be issued by it as fully paid, being the transfer and assignment to it by Eldred as above stated of all the rights, concessions and franchises which the National Bell Telephone Company had promised, upon the conditions stated in Mr. Vail's letter to him of Nov. 29 1879,[3] to grant. And it appears from that letter that it was understood between Eldred and the National Bell Telephone Company that these rights were to be transferred by him to a corporation to be formed in Missouri, under the name of the Bell Telephone Company of Missouri.

On arriving at St. Louis, about the 1st of December, 1879, Mr. Eldred employed Messrs Overall & Judson, attorneys of that city, for the purpose of drawing the papers necessary for organizing and launching the corporation. Messrs. Durant, Smith and Eldred, being a majority of the proposed corporators, were in St. Louis. Messrs. Kent and Storke being in New York, Mr. Eldred brought proxies to St. Louis to represent them there.[4] Several meetings

[1] Rec. p. 30.
[2] Rec. p. 17.
[3] Rec. p. 12.
[4] Rec. p. 10.

were held by Eldred, Durant and Smith, some of them at the office of Overall & Judson, and on December 3, 1879, the Bell Telephone Company of Missouri was organized under Articles of Association bearing that date, Eldred being made the President of the company. He was also at that time President of the American District Telegraph Company, whose contract with the National Bell Telephone Company had still about one year to run.

In pursuance of the original agreement above stated between them, the entire authorized capital stock of the Bell Telephone Company, to wit 4,000 shares, was subscribed for by the five corporators above named; Eldred subscribing for and having allotted to him 2,230 shares, Storke and Durant each 750 shares, Kent 250 shares, and Smith 20 shares; and certificates of stock for those amounts respectively were at first made out, with the intention of delivering them to said subscribers.[1]

Immediately after organizing the Bell Telephone Company of Missouri, on December 3, 1879, as above stated, Eldred went to Kansas City and went through some "formalities" there, including the obtaining from the Kansas City Telephone Exchange an instrument under date of December 8, 1879, by which its rights under its contract with the National Bell Telephone Company were transferred to the Bell Telephone Company of Missouri: thus fulfilling that part of the conditions prescribed by the National Bell Telephone Company. From Kansas City Eldred went to Denver[2] on other business, and returned to St. Louis about the 18th or 19th of December, in order to complete the fulfilment of the conditions prescribed by the National Bell Telephone Company, in Mr. Vail's letter to him of November 29, 1879, by procuring the surrender of the contract with that company which was still held by the American District Telegraph Company. At this point a difficulty was met. The

[1] Rec. p. 33.
[2] Rec. p. 23.

entire capital stock of the Bell Telephone Company of Missouri, 4,000 shares in all, had already been disposed of as above stated. That company had received no money for any of said stock, and had allotted the entire 4,000 shares, as fully paid, to the five corporators above named; and it had nothing left with which to compensate the American District Telegraph Company or its stockholders for surrendering their rights under the telephone patents, which they held under the still outstanding contract between that company and the National Bell Telephone Company.[1]

On December 19, 1879, a consultation was held between Eldred, Durant and Smith, at the office of the Bell Telephone Company on Sixth Street, in St. Louis, as to how this difficulty should be overcome. This meeting, or consultation, was not a meeting either of the Board of Directors of the Bell Telephone Company of Missouri, or a meeting of the stockholders of that company as such, but simply a conference between Eldred, Durant and Smith, as individuals[2] interested in fulfilling the remaining conditions imposed by the National Bell Telephone Company, and without the fulfillment of which[3] it would be impossible for the Bell Telephone Company of Missouri to proceed with its business as contemplated.

The following extract from Eldred's testimony on cross-examination relates to this meeting:[4] —

Q. State, if you can, what actually took place — not your imagination or understandings, but what actually took place at the time you agreed that this 250 shares of stock should be issued to the stockholders of the American District Telegraph Company?

A. All that I remember about that particular portion of it is that it was at no meeting of the board; so far as my recollection goes Mr. Durant was the only person present

[1] Rec. pp. 22, 28–9, 43.
[2] Pr. Rec. pp. 22; 32.
[3] Pr. Rec. p. 19.
[4] Rec. p. 22

and we found by figuring up the stock that we hadn't enough shares to take in the American District Telegraph Company of St. Louis. These gentlemen in interest were all personal friends of mine. Some of them were in New York, and I had no authority to make any concessions for them, and I therefore agreed with Mr. Durant, who was vice-president and general manager of the company, to advance 250 shares of the stock of the Bell Telephone Company of Missouri, so that we might take up the entire capital stock of the American District Telegraph Company.

Q. You say that you "agreed." What did Durant say?

A. Mr. Durant didn't have much to say about it; I was the owner of the property, but he acquiesced generally in all I did.

Q. You offered these 250 shares of stock to be used in that way?

A. Yes, sir.

Q. And Durant acquiesced in it?

A. Yes; he acquiesced or he wouldn't have taken the stock.

Q. Wasn't Mr. Smith present at the time?

A. No, sir; he was not.

Q. Are you sure of that?

A. I am.

It appears that the mode in which it had been determined, upon the advice of Messrs. Overall & Judson, to secure the rights held by The American District Telegraph Company under their contract with the National Bell Telephone Company, was, that a consolidation should be effected, under the laws of Missouri, of the Bell Telephone Company of Missouri, as already organized, with the American District Telegraph Company. But the question which now presented itself was, — since the entire stock of the Bell Telephone Company of Missouri had been subscribed for and allotted as above stated, — how to provide a consideration or compensation from the Bell Telephone Company of Missouri to the American District Telegraph Company, or its stockholders, for their surrender of those rights?

The conference between Eldred, Durant and Smith on that subject was very brief, the question being solved by a

voluntary offer made by Eldred himself, that he would give 250 shares out of the 2,230 shares of stock in the Bell Telephone Company of Missouri which had already been reserved by and allotted to himself, to be exchanged by the Bell Telephone Company of Missouri for the entire capital stock of the American District Telegraph Company, consisting of 500 shares.[1] In other words, Eldred offered to take, as his proportion of the capital stock of the Bell Telephone Company of Missouri, 1,980 shares, instead of the 2,230 shares he had originally reserved for himself. This offer was at once agreed to by his associates, and Eldred and Durant immediately went from their office to the office of Overall & Judson to have the papers prepared accordingly.[2]

It further appears from the testimony that Mr. Judson, as attorney for the Bell Telephone Company of Missouri, had already prepared certain resolutions[3] to be adopted by the stockholders of the Bell Telephone Company formally setting forth the acceptance by that company from Eldred of his proposition to transfer to it the rights granted to him by the National Bell Telephone Company. This paper was written in ink, upon two sheets, and had been prepared upon the original plan of giving Eldred 2,230 shares of full paid stock, and dividing the remaining 1,770 shares among the other four corporators in the proportions above stated. Immediately upon Eldred's agreement to give up 250 shares of stock for the purpose above mentioned, Eldred and Durant went to Overall & Judson's office, taking this paper with them, and explained to Mr. Judson the change that had been made, requesting him to make the necessary change in the resolutions already drafted. This Mr. Judson did at once, interpolating an additional page, or part of a page, written by him in pencil,[4] which set forth an agreement by

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[1] Pr. Rec. pp. 22; 32; 42; 43-4.
[2] Pr. Rec. p. 43.
[3] Pr. Rec. p. 41.
[4] Pr. Rec. p. 41.

H. H. Eldred to surrender to the company 250 shares of the stock so allotted to him, for the purpose of effecting a consolidation with the American District Telegraph Company.

The three sheets on which the original draft of these resolutions was written, including the addition or interpolation so made upon it by Mr. Judson at the request of Eldred and Durant, were produced in evidence by the defendant, and identified by Durant[1] and were also identified by Mr. Judson[2] who testified that these papers, including the portion interpolated in pencil by him on December 19, were prepared in exact accordance with specific instructions given him by Eldred and Durant for that purpose.

On the same day, December 19, 1879, a meeting of the stockholders of the Bell Telephone Company was held at the office of said company, at which Messrs. Durant, Eldred, and Smith were present. Defendant produced and put in evidence, from the minute book of the defendant corporation, the proceedings of that meeting,[3] as therein entered. From this record, it appeared that Eldred was chairman of said meeting, and that a preamble and resolution was offered by Durant, and unanimously adopted; which resolution, as appearing on said minutes, was identical with the contents of the original paper testified to by Durant and by Judson as having been originally prepared by Judson, as the attorney of the company, and subsequently altered by him, under specific instructions from Eldred and Durant, by interpolating the further statement therein contained in reference to the surrender by Eldred of 250 shares out of the 2,230 shares originally allotted to him, for the purpose of effecting the consolidation with the American District Telegraph Company.

The precise change so made by Judson, under instructions from both Eldred and Durant, in the resolution as

[1] Rec. pp. 29, 30.
[2] Rec. p. 41.
[3] Pr. Rec. pp. 32, 33

originally drafted, was as follows, — the words below printed in italics being the words which were so interpolated in the resolution as originally drafted.[1]

Resolved, That in consideration of the complete assignment to this corporation in due form of all the rights, title and interest of said parties in said exclusive rights, concessions and franchises, so that the same may be as fully possessed, enjoyed, and enforced as by said Eldred, this corporation hereby allots and sets apart to said parties 4000 full-paid shares of its capital stock, constituting the authorized capital stock of said company, to each of said parties a proportionate part of said 4,000 shares, according to his interest in said rights, concessions and franchises, and according to the subscription of each to the capital stock of this company, and constituting a full payment of said subscription: H. L. Storke, 750 shares; George H. Kent, 250 shares; E. A. Smith, 20 shares; George F. Durant, 750 shares; H. H. Eldred, 2,230 shares; *and in consideration of the agreement of H. H. Eldred to surrender to this company 250 shares of stock so allotted to him for the purpose of effecting a consolidation with the American District Telegraph Company of St. Louis a certificate of 1,980 shares shall be issued to said Eldred, and the said 250 shares so surrendered shall be retained in the possession of this company, subject to issuance hereafter for said purpose of consolidation;* and the officers of the company are directed to issue in due form certificates of said stock to said parties above named, and to do and perform all acts necessary and proper for the full acceptance on the part of this company of the aforesaid agreements and propositions of the National Bell Telephone Company in the execution of contracts or otherwise.

In accordance with this agreement on the part of Eldred to surrender 250 shares out of the 2,230 shares of stock originally reserved by and allotted to him, in order to furnish to the Bell Telephone Company of Missouri the means of purchasing the entire stock of the American District Telephone Company at the rate of one share

[1] Pr. Rec. pp. 32-33.

for two, the certificate of 2,230 shares said stock which had previously been made out for Eldred, but not delivered to him, was destroyed and another certificate prepared for 1,980 shares, which was delivered to to and receipted for by Eldred. Said certificate and receipt were put in evidence by the defendant;[1] the original number 2,230, which had been written on the stub of the certificate first made out for Eldred, being crossed out and the number 1,980 substituted, on the stub, so as to correspond with the shares actually issued to him.

It further appeared, both from the testimony of Durant[2] and from that of Eldred himself,[3] that no agreement, either written or oral, was ever made with Eldred by any officer of the Bell Telephone Company of Missouri, as such, in respect of these 250 shares of stock surrendered by him, nor was any action ever taken by the Board of Directors of said company on that subject, nor any promise made to Eldred in respect of said 250 shares by any officer of the company; nor was any demand ever made by Eldred upon the Bell Telephone Company in reference to his alleged claim for the return to him of said 250 shares of stock, until October 14, 1881, nearly two years after he had accepted, under the circumstances above stated, a certificate for 1,980 shares, in pursuance of the resolution adopted at the stockholder's meeting on December 19, 1879, above set forth.

The foregoing statement contains, in substance, all the testimony offered at the trial of said cause.

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[1] Rec. p. 33.
[2] Pr. Rec. p. 34.
[3] Pr. Rec. p. 13.

ARGUMENT FOR DEFENDANT IN ERROR.

I.

The Circuit Court did not err in excluding the testimony offered by plaintiff and objected to by defendant, as above set forth; nor in overruling the objections by plaintiff to testimony offered by defendant, as above set forth.

It is not supposed that any serious question will be made here in respect of the rulings on evidence above mentioned [1] nor is it necessary to discuss them in detail.

It is submitted for defendant in error that in each of those rulings the court correctly applied familiar rules of evidence; and, even if any or all of them were held to be erroneous, they related to no material matter, nor could have affected the final decision of the case. Each of them is fully set forth in the preceding statement, if this court should find it necessary to pass upon them.

II.

The Circuit Court did not err in refusing the instructions asked by plaintiff, or either of them.

If this court shall hold, as hereinafter contended, that the instruction given by the Circuit Court to the jury of its own motion — to wit, that under the evidence adduced they should find for the defendant, — was a correct legal conclusion from the whole evidence, it follows that the instructions asked for by plaintiff were properly refused; and on that theory, it would be unnecessary to consider the plaint-

[1] *Supra*, pp. 7-11.

iff's instructions in detail. But, without reference to the legal effect of the evidence, taken as a whole, each of said instructions was properly refused, for the following reasons: —

1. The Circuit Court properly refused plaintiff's first instruction to the effect that if plaintiff should recover, he was entitled to interest on the principal amount sued for, from date of demand made therefor.

The question of interest in this case, if the plaintiff was entitled to recover, depended on the statute of Missouri concerning interest.

1 Am. Lead. Cas. (5th ed.) 645 (*529);
Young *v.* Godbe, 15 Wallace, 565.

That statute provides that in the absence of a written contract fixing the rate of interest, creditors shall be entitled to receive interest at 6 per cent per annum in the following cases: —

On money due on written contracts;
On accounts, after they become due and demand of payment is made;
On money recovered for another's use and retained without the owner's knowledge;
On all other money due or to become due, on which payment of interest has been expressly promised;

On money due under any judgment or order of court.

1 Rev. Stat. Mo. 1879, p. 458, chap. 41, sec. 2723.

Interest is not allowed by this statute in any other case than these, and is therefore recoverable in no other case. The demand here sued on falls under neither of the above heads, being (as alleged) an agreement to return to the plaintiff certain shares of stock alleged to have been ad-

vanced by him to defendant, — such agreement, if it existed at all, being an implied agreement only, the plaintiff himself testifying[1] that no express agreement was ever made with him on the subject.

2. Each of the remaining five instructions prayed by plaintiff[2] was properly refused, because each of them was based on a theory of the case not only unsupported, but contradicted, by the testimony.

(*a*). Plaintiff's second instruction was improper, because it was neither alleged nor proved that plaintiff "agreed to relinquish to defendant all claim to 250 of such shares in consideration of his receiving 1,980 shares." The proof was clear that plaintiff voluntarily offered to and did surrender to the defendant company his claim to 250 of said shares, in consideration that the defendant should use said shares in effecting a consolidation with the American District Telegraph Company, and should thereby procure the surrender to it of the outstanding contract held by the District Telegraph Company. Such surrender or transfer of said contract was a condition which plaintiff himself had undertaken to fulfill, as part of his own contract with the defendant company for the absolute transfer to it by him of the rights conditionally promised to him by the National Bell Telephone Company. In other words, a valuable consideration was received by plaintiff for the surrender of said 250 shares of the defendant company, in this — that only by means of such surrender, for the purpose stated in the resolutions of consolidation,[3] plaintiff was able to fulfill his own obligations, to the defendant company on the one hand and to the National Bell Telephone Company on the other.[4]

(*b*). Plaintiff's third instruction was obviously improper. Plaintiff did receive (as above shown), a valuable consideration for surrendering or waiving his claim to said 250

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[1] Pr. Rec. p. 13.
[2] Pr. Rec. pp. 47–48.
[3] Pr. Rec. p. 33.
[4] Pr. Rec. pp. 15; 19, 20; 32, 33.

shares of stock. The fact that other stockholders in the corporation were also benefited thereby is wholly immaterial.

(*c*). Plaintiff's fourth instruction was properly refused, because there was no evidence to support it. The plaintiff himself testified not only that there never was any agreement between him and the company, or any officer thereof, in respect of this stock,[1] but also that his own agreement with Durant and others to take 1,980 shares instead of 2,230 shares of the capital stock, and that the remaining 250 shares should be used in purchasing the outstanding contract held by the American District Telegraph Company (thus fulfilling his own obligation in that regard), was made by him as an individual to other individual stockholders of the company; and that the only action taken *by the defendant company* was its acceptance of said 250 shares of stock for that purpose, which purpose was accomplished.

(*d*). Plaintiff's fifth instruction was properly refused. It assumed facts contrary to the proof, and was also an erroneous statement of the law upon the facts assumed. The jury could not find, from the evidence before them, simply "that the plaintiff delivered to the defendant the 250 shares of stock in question, to be by the defendant used *for its own benefit*, and that nothing was said between them on subject of payment for the stock." The jury must necessarily have found, on the whole proof, that said stock was surrendered by plaintiff to the defendant company to be used by it in procuring the surrender by the American District Telegraph Company of its outstanding contract, thereby fulfilling the plaintiff's own obligation to procure such surrender, — and that said stock was used for that purpose, and that plaintiff, as well as the defendant, was benefited thereby. Under such circumstances the law would by no means presume an "understanding" that defendant was to pay the plaintiff anything for said stock.

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[1] Pr. Rec. p. 13.

(*e*). Plaintiff's sixth instruction was properly refused for the like reason. It was merely a restatement, in different words, of the same erroneous version of the proof and incorrect theory of the law as contained in the preceding instruction.

III.

The Circuit Court did not err in granting the instruction prayed for by defendant.

The propositions of fact contained in the instruction asked by defendant were in accordance with the testimony of Eldred himself, and were confirmed by all the witnesses for defendant. The issue of fact presented by that instruction was the only issue presented by the pleadings in the cause, and was correctly stated. It can not be seriously denied that the burden of proving the agreement alleged in the petition rested upon the plaintiff, nor that plaintiff was bound to prove that such agreement as alleged by him was made by the defendant corporation or some authorized officer thereof. That no such agreement was made with plaintiff by any officer of the defendant corporation was distinctly admitted by the plaintiff himself, in his own testimony; [1] and there was no other testimony for plaintiff on that subject. The instruction asked by defendant was therefore properly granted.

IV.

The Circuit Court did not err in instructing the jury that under the evidence before them they should find for the defendant.

Under this head two questions arise, namely:—

Whether, if upon the whole evidence the defendant was

[1] Pr. Rec. p. 13.

entitled to a verdict, it was proper practice for the Circuit Court to so instruct the jury?

Whether upon the whole evidence, the defendant was entitled to a verdict?

1. The question of law thus presented has been settled beyond any controversy, by repeated decisions of this court.

Oscanyan *v.* Arms Co., 103 U. S. 261, 264–66;
Railroad Company *v.* Fraloff, 100 U. S. 24, 26;
Pleasants *v.* Fant, 22 Wall. 122;
Merchant's Bank *v.* State Bank, 10 Wall. 637;

In *Oscanyan v. Arms Co.* (103 U. S. 266) this court said: —

"Indeed, there can be at this day no serious doubt that "the court may at any time direct a verdict when the facts "are undisputed, and that the jury should follow such "direction."

In *Pleasants v. Fant*, 22 Wall. 122, this court said: —

"We hold the true principle to be that if the court is "satisfied that, conceding all the inferences which the jury "could justifiably draw from the testimony, the evidence is "insufficient to warrant a verdict for the plaintiff, the court "should say so to the jury."

2. The proof in this case established beyond any possible doubt that Eldred agreed with Durant and Smith — not as officers or stockholders of the defendant corporation, but simply as individuals, parcelling out between themselves the interests which they were to have in the new telephone company (defendant below) — that instead of reserving to himself an interest of 2,230-4,000ths in that company, as at first intended, he would reserve only 1,980-4,000ths, and that the shares of stock representing the remaining 250-

4,000ths should be used in acquiring for their common benefit the outstanding contract with the National Bell Telephone Company, which was still held by the American District Telegraph Company. In doing this, Eldred was neither lending nor advancing 250 shares of stock to the defendant corporation, to be afterwards accounted for by it to him. It was not even a gift of 250 shares of stock from Eldred to the new company or to his associates. It was simply a mode proposed and adopted by himself of fulfilling his own obligations, the fulfillment of which was an indispensable condition of carrying on the new enterprise at all.

Eldred agreed, in the first instance, with the National Bell Telephone Company, as one express condition of the concessions to be made to him by that company,[1] that he would in some way procure a surrender by the American District Telegraph Company of its unexpired contract for telephone rights in St. Louis. Unless this was done, the National Bell Telephone Company could not, for at least a year longer, grant to the proposed Bell Telephone Company of Missouri the rights necessary for its proposed operations in St. Louis. Eldred undertook to fulfill that condition, as well as the like conditions in respect of the Kansas City telephone exchanges. He was obliged to fulfill it, in order to set his new enterprise on foot. He admitted this in terms, on cross-examination.[2]

When he organized the Bell Telephone Company of Missouri (defendant below) and entered into an agreement with that corporation to transfer to it, absolutely, the concessions so conditionally promised him by the National Bell Telephone Company, in consideration that the defendant corporation should issue to him and his associates, as full paid, its entire capital stock of 4,000 shares, he also undertook with that corporation that he would himself fulfill the condition already accepted by him, namely, of obtaining

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[1] Pr. Rec. p. 12.

[2] Pr. Rec. pp. 18, 19.

the surrender of the District Telegraph Company's contract.

The means by which he proposed and agreed to fulfil this double obligation on his own part,— his obligation to the National Bell Telephone Company on the one hand, and to the Bell Telephone Company of Missouri (defendant below) on the other hand, to obtain the surrender of the American District Telegraph Company's contract,— was by giving up 250 shares of the stock in the defendant corporation which had been originally allotted to himself, to be exchanged for the entire 500 shares of stock issued by the District Telegraph Company, at the rate of one share for two. The testimony of Eldred himself, as well as that of all three witnesses for defendant, established beyond any controversy, not only that this was what he agreed to do, but that it was the only way of escape from the dilemma in which he had placed himself and his associates by the original allotment to them of the entire 4,000 shares of capital stock in the defendant corporation. It was indispensable in some way or other to procure the surrender of the American District Telegraph Company's contract, or else the National Bell Telephone Company could not fulfill its conditional promise to Eldred, to grant to him (for the Bell Telephone Company of Missouri), the rights mentioned in Vail's letter to him of November 29, 1879, and again mentioned in Vail's letter of March 25, 1880;[1] nor, unless the surrender of that contract was in some way procured, could Eldred himself carry out his own agreement with the Bell Telephone Company of Missouri, to transfer to it, unencumbered, the privileges and rights in question. This was the "snag" (as Smith called it),[2] which they struck. The testimony of Durant, Judson, and Smith,[3] was not only explicit and conclusive as to this, but was confirmed by that of Eldred,[4] in spite of his efforts to evade the questions put to

[1] Pr. Rec. p. 12.
[2] Pr. Rec. p. 43.
[3] Pr. Rec. pp. 29; 41; 43.
[4] Pr. Rec. pp. 18-20; 22.

him. And, if any further proof were needed, it was supplied by the express terms of the resolution prepared by Mr. Judson, as attorney for the defendant corporation, to meet that precise difficulty, and which was formally adopted, with Eldred's concurrence, at the meeting of stockholders of the defendant corporation on December 19. 1879,[1] and which the defendant proved both from its original records, and from the original draft of that resolution, as amended, in Mr. Judson's handwriting.

The testimony, therefore, not only failed altogether to support the averments of the petition, to the effect that these 250 shares of stock were "advanced" or loaned to the defendant corporation, but establishes, beyond any doubt, that Eldred deliberately surrendered them — or rather surrendered his right to have them allotted to him — for the purpose of fulfilling his own obligations to the defendant corporation, and of enabling that corporation to acquire from the American District Telegraph Company, by consolidation therewith, its outstanding rights under the unexpired contract in question: the surrender of that contract, and the acquisition by the defendant corporation of those rights, being not only indispensable to its operations, but a preliminary condition, thereof which Eldred had bound himself to fulfil.

It is therefore entirely clear that the Circuit Court was justified in holding that, "conceding all the inferences which "the jury could justifiably draw from the testimony, the "evidence was insufficient to warrant a verdict for the plaint-"iff:" and therefore, under the decisions of this court above cited, that it was the duty of the court below to instruct the jury as it did.

It is therefore submitted for the defendant in error that the judgment of the court below should be affirmed.

HENRY HITCHCOCK,
Of Counsel for Defendant in Error.

[1] Pr. Rec. pp. 32-3.